Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1979.

No. 79-976

LOCAL NO. 153, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

v.

FALSTAFF BREWING CORPORATION,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No.

LOCAL NO. 153, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

v.

FALSTAFF BREWING CORPORATION,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioner Falstaff Brewing Corporation ("Falstaff") prays that a writ of certiorari issue to review the Judgment Order of the United States Court of Appeals for the Third Circuit entered on October 22, 1979, affirming the final judgment of the United States District Court for the District of New Jersey in favor of respondent Local No. 153, International Brotherhood of Teamsters ("Union").

OPINIONS BELOW.

The United States District Court for the District of New Jersey filed an opinion herein on November 3, 1978 which opinion is unreported and is printed as Appendix D hereto, p. A7. The Judgment Order entered on October 22, 1979 by the United States Court of Appeals for the Third Circuit, affirming the final judgment of the District Court entered on November 3, 1978 is printed as Appendix C hereto, pp. A5-6; it states that the Court

of Appeals affirmed the judgment of the District Court "essentially for the reasons set forth in the opinion of the district court filed November 3, 1978".

JURISDICTION.

On October 22, 1979 the United States Court of Appeals for the Third Circuit entered a Judgment Order affirming the final judgment of the District Court. On November 2, 1979 Falstaff filed a petition for rehearing in banc, which petition was denied by an order of the Court of Appeals in banc entered on November 19, 1979, printed as Appendix B hereto, pp. A3-4. On November 21, 1979, Falstaff filed a motion for stay of the issuance of the mandate of the Court of Appeals pending application to this Court for a writ of certiorari. Falstaff's motion for stay was granted by order of the Court of Appeals dated December 7, 1979, printed as Appendix A hereto, p. A1, staying the issuance of the mandate of the Court of Appeals until December 26, 1979, and providing for a further stay upon Falstaff's filing of a petition for writ of certiorari in this Court on or before that date.

Jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW.

A collective bargaining agreement between a brewer of beer and the union covering the brewer's retail distribution operation, contained a prohibition against the contracting-out of the collective bargaining unit work. It also contained a provision preserving to the employer all of the rights of management. Because of severe financial losses, the employer shut down the retail distribution operation and laid off the employees.

The union filed a grievance charging contracting-out of the collective bargaining unit work because the employer sold beer at wholesale to two independent distributors who had been doing business in the local area. The grievance went to arbitration, and the arbitrator found that the employer had violated the no-contracting out provision. The arbitrator also found that the collective bargaining agreement had been automatically renewed for an additional 12-month period despite the union's notice of termination sent pursuant to the collective agreement. The arbitrator awarded $1.7 million in back-pay to the union, and the District Court affirmed the award. The Court of Appeals affirmed the judgment of the District Court.

The questions presented for review are whether the courts below erred in holding that:

1. The arbitrator's two crucial determinations on the contracting-out issue and the issue of contract termination, a jurisdictional issue, were judicially non-reviewable on the merits.

2. The collective bargaining agreement did not terminate upon the union's notice of termination, but was automatically renewed for an additional 12-month period, increasing the damages awarded by the arbitrator to the union by $1 million.

3. The employer had contracted-out the bargaining unit work, when the work consisted of the retail delivery of beer to the brewer's 17,000 customers in the local area, by selling beer from the employer's out-of-state plant at wholesale to two independent beer distributors who had been operating in the local area, which beer the two independent distributors then resold at retail to some of their 3,000 customers in the local area.

STATUTES INVOLVED.

Relevant provisions of the Labor Management Relations Act (29 U. S. C. § 173(d)) and of the Federal Arbitration Act (9 U. S. C. § 10) are set forth in Appendix G hereto.

STATEMENT OF THE CASE.

In April 1972, Falstaff purchased the right to brew and sell beer under the "Ballantine" label. Falstaff took over Ballantine's 17,000 customer accounts in the local area—northern New Jersey, metropolitan New York City, Staten Island and western Long Island. The old Ballantine brewery in Newark, New Jersey was closed, and Falstaff established a retail distribution Depot in North Bergen, New Jersey.

In November 1972, Local 153 of the International Brotherhood of Teamsters and Falstaff entered into a collective bargaining agreement. In 1974 and 1975, Falstaff faced a critical financial crisis, as a result of which Falstaff decided to shut down its North Bergen, New Jersey Depot. The shut-down took place on October 3, 1975, 8 months prior to the stated expiration date of the collective bargaining agreement between Falstaff and the Union, May 31, 1976.

When Falstaff's employees were laid off because of the shut-down, the Union did not file any grievance because of the shut-down. The Union conceded that closing of the Depot was one of the "rights of management". A grievance complaining of the shut-down would have been antithetical to the "rights of management" provision of the agreement which stated: "Subject to the terms of this collective bargaining Agreement, *nothing* in this Agreement shall be construed as *limiting* the Depot in the exercise of the 'Rights of Management' ".[1]

After the shut-down of Falstaff's North Bergen, New Jersey, Depot, two independent beer distributors who had been operating in the local area began to purchase Ballantine-labeled products from other independent distributors for resale to their own retail customers in the area. The two independent distributors then applied to Falstaff for the purchase of Ballantine-labeled products at *wholesale* at Falstaff's Cranston, Rhode Island brewery. Falstaff agreed, but required the independents to post substantial letters of credit.

Thereupon, the Union filed a grievance charging the contracting-out by Falstaff of the bargaining unit work in violation of a relevant provision of the collective bargaining agreement.[2] The grievance[3] related exclusively to the alleged contracting-out by Falstaff of the unit work; it made no reference to any contract termination issue. After the Arbitrator's initial award in favor of the Union on liability, the Union requested the Arbitrator to decide whether the collective bargaining agreement—which had 8 months to run to termination at the time when the Depot was shut down on October 3, 1975—had been automatically renewed despite the Union's notice of contract termination. After filing a written objection to the

1. Emphasis supplied to all quotations.

2. Article XVI of the collective bargaining agreement between Falstaff and the Union provided:

> Except as otherwise may be agreed upon between the Depot and the Union, the bargaining unit work shall continue to be performed *by the employees in the bargaining unit* except that the washing of vehicles *may be subcontracted to an independent agency*.

3. The Union's grievance stated:

> A dispute has arisen between the parties *concerning the Company contracting out of its delivery operations* in violation of the various provisions of the Collective Bargaining Agreement.

Arbitrator's assumption of jurisdiction over the contract termination issue, Falstaff acquiesced *arguendo* in the Arbitrator's decision of the issue.

The Arbitrator found that Falstaff had violated the no-contracting-out provision of the collective bargaining agreement between Falstaff and the Union by its *wholesale* sales to the two independent beer distributors from its Cranston, Rhode Island plant. The Arbitrator also held that the collective bargaining agreement had been automatically renewed for an additional 12-month period, adding $1 million to the back-pay award in favor of the Union, despite the Union's notice of termination of the agreement which emphasized the coming expiration date and the Union's intention to negotiate a *new* agreement, which intention foreclosed, as a matter of law, any automatic renewal of the collective agreement for an additional year.

Falstaff brought suit under § 301 of the Labor Management Relations Act of 1947 (29 U. S. C. § 185) and § 10 of the Federal Arbitration Act (9 U. S. C. § 10) to vacate the Arbitrator's award of $1.7 million. On November 3, 1978, the District Court filed an opinion and judgment in favor of the Union, enforcing the award issued by the Arbitrator in its entirety.

Referring to the parties' stipulation in the submission agreement that the Arbitrator's award would be "final and binding", the District Court held that the Arbitrator's award was judicially nonreviewable (A18-19).

The Court of Appeals affirmed the judgment of the District Court (Appendix F hereto, p. A56) for the reasons stated in the District Court's opinion.

REASONS FOR GRANTING THE WRIT.

The existence and scope of judicial review over the merits of an arbitration award is an important recurrent question. The opinions of the *Steelworkers Triology* decided by this Court, emphasizing the "exalted" position of the labor arbitrator, have been relied upon more and more by the federal judiciary and the limits on the arbitrator's powers have been increasingly ignored, leading to the stultifying situation where—as in the instant case—an arbitrator's errors are clearly recognizable but are not corrected.

The instant case is an exemplar of the growing and dangerous tendency among the federal judiciary to "rubber stamp" an Arbitrator's findings and not to engage in any review on the merits. We submit that the courts below recognized that the Arbitrator's two crucial determinations were clearly erroneous, but believed that this Court's decisions made such determinations immune from judicial review on the merits. As a result, Falstaff is subject to a $1.7 million judgment based on two completely arbitrary and capricious findings, which also were completely without support in the record before the Arbitrator.

I. The Views of the Courts Below as to the Scope of Judicial Review Over the Merits of the Arbitrator's Findings Were Wrong.

The Arbitrator made two crucial findings which we show below were totally arbitrary and capricious and which were without any support in the record. First, the Arbitrator found that after its shut-down of the North Bergen, New Jersey Depot, Falstaff contracted-out the bargaining unit work to two independent beer distributors who operated in the local area. Second, the Arbitrator

found that the collective bargaining agreement between Falstaff and the Union was automatically renewed for an additional 12-month period after the shut-down despite the Union's timely notice of termination of the agreement expressing the Union's intention to negotiate a *new* collective bargaining agreement. These two crucial findings, the courts below held, were judicially non-reviewable on the merits.

The District Court believed that it had *no* function of judicial review over the merits saying, for example, that in the instant case there would be "only a temporary sojourn in this court between the arbitrator and the Court of Appeals in Philadelphia". The District Court did not perform any real review function over the merits. For example, speaking of the issue of contract termination, the District Court said that the merits of the issue "do not bear more than a *cursory* examination by this court once it has been determined that the arbitrator did, indeed, have the power and authority to decide the issue." The District Court held that the scope of judicial review over the Arbitrator's determination of the contract termination issue was whether in light of the Arbitrator's analysis of the facts presented to him it was *logically possible* to interpret "the relevant Article of the agreement the way the Arbitrator did." The District Court noted that "My subjective opinion as to the proper construction or application of the clause is of no moment here" and that "Certainly the arbitrator *had grounds* upon which to base his interpretation".

The standard of judicial review over the merits utilized by the courts below was erroneous. The decisions of the court below that the determinations of the Arbitrator were judicially *non-reviewable* is in conflict with this Court's decision in the *United Steelworkers v. Enterprise Wheel and Car Corp.*, 363 U. S. 593, 80 S. Ct. 1358, 1361, 4 L. Ed. 2d 1424 (1960). *Enterprise Wheel and Car* requires review over the merits by the court to ascertain, at the very least, that an arbitration award draws its "essence" from the collective bargaining agreement. In *Enterprise Wheel and Car Corp.* this Court warned, 363 U. S. 593, 597, 80 S. Ct. 1361, that an arbitrator is "confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice". This Court pointed out that the arbitrator "may look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement." *Ibid.*

The Arbitrator's decision of the two crucial issues herein was clearly subject to the judicial review over the merits envisioned by this Court under the "essence" test of *Enterprise Wheel and Car.* Those findings were, similarly, subject to judicial review under the formulation of the "essence" test by the Third Circuit itself in *Ludwig Honold Mfg. Co. v. Fletcher,* 405 F. 2d 1123 (3d Cir. 1969), where the court held that a labor arbitrator's award draws its "essence" from the collective bargaining agreement when it is found that the arbitrator's interpretation can, in a rational way, be derived from the agreement viewed in light of its language, its context, and other indicia of the parties' intention; but where there has been a manifest disregard of the agreement by the arbitrator, unsupported by the principles of contract construction, a court reviewing the merits may disturb the award.

Under the *Honold* standard, a court must *review* the merits of an arbitrator's determinations. The courts below clearly did not engage in such a review of the merits. Unless corrected by this Court, the decision in the instant case will furnish additional support to the dispensing by labor arbitrators of their "own brand[s] of industrial justice."

II. The Merits of the Issue of Contract Termination Was, as a Jurisdictional Issue, Subject to Full Judicial Review.

The Arbitrator's determination that the collective bargaining agreement had been automatically renewed for an additional 12-month period, despite the Union's notice of termination, was a *jurisdictional* finding. Unless such a renewal had taken place, no collective bargaining agreement would have been in existence during the additional 12-month period, and there would have been absolutely no basis for the award of an additional $1 million in favor of the Union for that additional period. The District Court also would have had no basis for enforcement of such additional $1 million award.

The decisions of the courts below, which made immune from judicial review the Arbitrator's jurisdictional finding on the contract termination issue, are in conflict with the teaching of this Court's relevant decisions. Whether an arbitrator has *jurisdiction* over a particular dispute is a question for *judicial* decision, and a finding by an arbitrator that he has jurisdiction to decide a dispute is subject to broad and rigorous judicial review. *John Wiley & Sons v. Livingston,* 376 U. S. 543, 84 S. Ct. 909, 11 L. Ed. 2d 898 (1964); and *Humphrey v. Moore,* 375 U. S. 335, 84 S. Ct. 363, 11 L. Ed. 2d 370 (1964). In addition, the decision of the courts below making non-reviewable the Arbitrator's *jurisdictional* determination, is in conflict with the following decisions of every Court of Appeals which has decided the issue, including other panels of the Third Circuit:

Second Circuit: *Procter & Gamble Independent Union v. Procter & Gamble Mfg. Co.,* 312 F. 2d 181 (1962);

Third Circuit: *Teamsters Local No. 249 v. Kroger Co.,* 411 F. 2d 1191 (1969); *Bieski v. Eastern Automobile Forwarding Co.,* 396 F. 2d 32 (3d Cir. 1968); *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America Local 249 v. Western Pennsylvania Motor Carriers Association,* 574 F. 2d 783 (3d Cir. 1978);

Fifth Circuit: *International Ladies' Garment Workers' Union v. Ashland Industries,* 488 F. 2d 641 (1974);
Sixth Circuit: *United Auto Workers Local No. 998 v. B. & T. Metals Co.,* 315 F. 2d 432 (1963);

Seventh Circuit: *Oil, Chemical & Atomic Workers Local 7-210 v. American Maize Products Co.,* 492 F. 2d 409, *cert. denied,* 417 U. S. 969, 94 S. Ct. 3173, 41 L. Ed. 2d 1140 (1974);

Eighth Circuit: *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. International Telephone and Telegraph Corporation, Thermotech Division,* 508 F. 2d 1309, 1313 (8th Cir. 1975);

Tenth Circuit: *United Mine Workers of America, District 22 v. Roncco,* 314 F. 2d 186 (1963); *M. K. & O. Transit Lines, Inc. v. Association of Street, Electrical Railway and Motor Coach Employees,* 319 F. 2d 488 (1963).

III. The Arbitrator's Decision on the Contract Termination Issue Was Arbitrary and Capricious.

The Arbitrator's decision that the collective bargaining agreement had not terminated on its stated expiration date as a result of the Union's notice of termination, but had been automatically renewed for an additional 12-month term, was totally capricious and arbitrary. The record before the Arbitrator shows that the Union sent

Falstaff a notice of termination conforming in every way with the requirements of the termination Article of the collective bargaining agreement. The notice was timely, sent on March 11, 1976, more than 60 days prior to the agreement's expiration date. The Union's notice stated that it was given "in accordance with" the collective agreement between the parties. It asserted that the collective bargaining agreement would expire "shortly", and stated the Union's desire to "negotiate a *new* agreement".[4] Giving of the notice foreclosed any possibility of an automatic renewal of the collective agreement.

The Arbitrator was totally wrong in finding that the Union's notice of termination did not result in the expiration of the collective bargaining agreement on May 31, 1976, its stated expiration date. The Arbitrator held that, in addition to the Union's notice of termination, Falstaff was also obligated to give a similar notice to the Union, in order to forestall an automatic renewal of the agreement for an additional 12-month period. This was a capricious determination since the agreement itself states that it may be terminated by notice given by *either* party.

The Arbitrator held that the Union's notice of termination was rescinded when the Union chose not to submit its desired changes. The Arbitrator and the courts below misapprehended the clear meaning of the termination Article of the agreement. There is not a word in the collective bargaining agreement which could possibly support the view that the effectiveness of a notice of termination—once given by either party—would turn on whether the party giving notice later submits, or does not submit, the changes for the new agreement. To the contrary, the parties' collective bargaining agreement provided for a notice of termination merely stating that changes are *desired* in the existing agreement and *will be* submitted to the other side. The failure of the party giving notice of termination to submit such changes to the other side might affect a new contract, but such failure could not possibly vitiate the effect of the notice of termination already given, accepted and relied upon by the other party.

4. The Union's March 11, 1976 notice of termination read as follows:

> *In accordance with our labor agreement* with you which *expires* shortly, please be advised that in the near future we will submit to you *the proposed changes for our new agreement.*
>
> Will you please sign the enclosed duplicate letter and return it to this office for our files which will indicate that you have *received this notice.*
>
> I hope we can resolve our agreement as harmoniously as we have in the past. *Our contract expires May 31, 1976.*

The decision of the courts below that the agreement was renewed for another year is in conflict with the decision of the Third Circuit itself in the leading case of *Paterson Parchment Paper Co. v. International Brotherhood of Paper Makers*, 191 F. 2d 252 (3d Cir. 1951), *cert. denied*, 342 U. S. 933 (1952), which has been followed by three other Circuits:

> **Seventh Circuit:** *Oil, Chemical and Atomic Workers International Union, AFL-CIO v. American Maize Products Company*, 492 F. 2d 409, 412 (1974); and *Baker v. Fleet Maintenance, Inc.*, 409 F. 2d 551, 554 (1969);
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> **Ninth Circuit:** *East Bay Union of Machinists, Local 1304, United Steelworkers of America v. Fibreboard Paper Products Corp.*, 285 F. Supp. 282, 287, 289 (N. D. Calif. 1968), *aff'd*, 435 F. 2d 556 (9th Cir. 1970);
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> **Tenth Circuit:** *M. K. & O. Transit Lines v. Division No. 892, Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America*, 319 F. 2d 488, 491 n.5 (1963).

IV. The Arbitrator's Determination That Falstaff Violated the No-Contracting-Out Provision of the Collective Bargaining Agreement Was Arbitrary and Capricious.

The Arbitrator concluded that the no-contracting-out provision of the collective agreement was violated by Falstaff when Falstaff made sales of beer at *wholesale* from its Cranston, Rhode Island brewery to two independent beer distributors operating in the local area who then resold the beer at *retail* to some of their customers in the local area. The two independents had some 3,000 retail customers, as contrasted to the 17,000 retail customers which the Falstaff North Bergen, New Jersey Depot had before it closed.

The Arbitrator's decision was arbitrary and unsupportable. The bargaining unit work, admittedly, consisted of the distribution by Falstaff of beer at *retail* from its North Bergen, New Jersey Depot to some 17,000 customers in the local area. The sales by Falstaff at *wholesale* to the two independents from its Cranston, Rhode Island plant, had no relevance to the bargaining unit work. Nor did the sales thereafter at *retail* by the two independent beer distributors to their own customers have anything to do with the bargaining unit work.

Further, there was no proof that Falstaff had contracted with the two independents to have them act as the agents of Falstaff in the retail distribution of beer. There was absolutely no showing by the Union that *any* of the 3,000 retail customers of the two independents in the local area had been retail customers of the Falstaff, North Bergen, New Jersey Depot before its shut-down. There was also no proof at all that any of the delivery routes of the two independent distributors corresponded to any of the former routes of the Falstaff North Bergen, New Jersey Depot before its shut-down.

It was undisputed that the bargaining unit work consisted of the delivery of beer by Falstaff from the North Bergen, New Jersey Depot to its 17,000 retail customers in the local area, under the control of Falstaff, by Falstaff personnel, and with Falstaff taking all the risks of profit and loss. The Arbitrator held erroneously that the collective bargaining unit work also embraced, in effect, the purchase of beer at *wholesale* by the two independent distributors from Falstaff's Cranston, Rhode Island plant and the resale of such beer at *retail* by the two independents.

There was indisputably no contracting-out by Falstaff of the bargaining unit work. There was no replacement of the bargaining unit employees with others to do the *same* work at the *same* place and under the *control* of and for the *benefit* of Falstaff. After suffering enormous losses during 1974-75, Falstaff's shut-down of its North Bergen, New Jersey Depot, admittedly, was an exercise of its rights of management and an entrepreneurial decision changing the economic direction of the company. After the Depot closed, Falstaff sold beer at *wholesale* from its Cranston, Rhode Island plant to the two independents. To refuse to do so might well have subjected Falstaff to a charge of violation of the antitrust laws. But Falstaff had absolutely no concern with the beer purchased by the two independent distributors at *wholesale* after their purchases, and the employees of the two independents were in no way performing the Depot bargaining unit work. The decisions of the court below that there was a contracting-out of the unit work is directly in conflict with this Court's decision in *Fibreboard Products Corporation v. NLRB*, 379 U. S. 203, 85 S. Ct. 398, 379 L. Ed. 2d 233 (1964).

The decisions of the courts below also conflict with the decision of the Eighth Circuit in *NLRB v. Adams*

Dairy, Inc., 350 F. 2d 108 (8th Cir. 1965), and with the decision of the Third Circuit itself in *NLRB v. Royal Plating & Polishing Co.*, 350 F. 2d 191 (3d Cir. 1965).

CONCLUSION.

For the foregoing reasons, a writ of certiorari should issue to review the Judgment Order of the Third Circuit entered on October 22, 1979.

Respectfully submitted,

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December 21, 1979.

APPENDIX A.

Order of the Court of Appeals Granting Appellant's Motion for Stay Pending Application for a Writ of Certiorari.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-1220

FALSTAFF BREWING CORPORATION

v.

LOCAL UNION NO. 153 a/w INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN and HELPERS OF AMERICA,
(D. C. Civil No. 76-1383)

LOCAL NO. 153, INTERNATIONAL BROTHERHOOD OF TEAMSTERS

v.

FALSTAFF BREWING CORPORATION, a corporation of the State of Delaware and authorized to do business in the State of New Jersey
(D. C. Civil No. 78-1483)

Falstaff Brewing Corporation, Plaintiff in Civil Action No. 76-1383 and defendant in Civil Action No. 78-1483,
Appellant.

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until December 26, 1979.

A. LEON HIGGINBOTHAM
Circuit Judge

Dated: December 7, 1979

APPENDIX B.

Order of the Court of Appeals Denying Appellant's Petition for Rehearing In Banc.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-1220

FALSTAFF BREWING CORPORATION

v.

LOCAL UNION NO. 153 a/w INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN and HELPERS OF AMERICA, an unincorporated labor union
(D. C. Civil No. 76-1383)

LOCAL NO. 153, INTERNATIONAL BROTHERHOOD OF TEAMSTERS

v.

FALSTAFF BREWING CORPORATION, a corporation of the State of Delaware and authorized to do business in the State of New Jersey
(D. C. Civil No. 78-2483)

Falstaff Brewing Corporation, plaintiff in Civil Action No. 76-1383 and defendant in Civil Action No. 78-1483,
Appellant.

Sur Petition for Rehearing

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH, HIGGINBOTHAM and SLOVITER, *Circuit Judges*

The petition for rehearing filed by Appellant Falstaff Brewing Corporation in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By THE COURT,

/s/ JOHN J .GIBBONS
John J. Gibbons

Dated: November 19, 1979

APPENDIX C.

Judgment Order of the Court of Appeals.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-1220

FALSTAFF BREWING CORPORATION

v.

LOCAL UNION NO. 153 a/w INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN and HELPERS OF AMERICA, an unincorporated labor union
(D. C. Civil No. 76-1383)

LOCAL NO. 153, INTERNATIONAL BROTHERHOOD OF TEAMSTERS

v.

FALSTAFF BREWING CORPORATION, a corporation of the State of Delaware and authorized to do business in the State of New Jersey
(D. C. Civil No. 78-1483)

Falstaff Brewing Corporation, plaintiff in Civil Action No. 76-1383 and defendant in Civil Action No. 78-1483,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Submitted Under Third Circuit Rule 12(6)
October 19, 1979

Before: GIBBONS and HIGGINBOTHAM, *Circuit Judges* and ZIEGLER, *District Judge*°

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Judgment Order.

Appellant Falstaff Brewing Corporation appeals from a final judgment enforcing an arbitration award. We affirm the judgment essentially for the reasons set forth in the opinion of the district court filed November 3, 1978.

It is ORDERED and ADJUDGED that the judgment of the district court is affirmed. Costs are taxed in favor of appellee.

By THE COURT,

JOHN J. GIBBONS
Circuit Judge
Attest:
THOMAS F. QUINN
Thomas F. Quinn, Clerk

DATED: October 22, 1979

° Hon. Donald E. Ziegler, United States District Judge for the Western District of Pennsylvania, sitting by designation.

APPENDIX D.

Opinion of the District Court.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 76-1383

FALSTAFF BREWING CORPORATION,
Plaintiff,

v.

LOCAL NO. 153, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
Defendant.

Civil Action No. 78-1483

LOCAL UNION NO. 153, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, an unincorporated labor union,
Plaintiff,

v.

FALSTAFF BREWING CORPORATION, a corporation of the State of Delaware and authorized to do business in the State of New Jersey,
Defendant.

Opinion

Appearances:

Pachman, Aron & Till, Esqs.
By: Peter W. Till, Esq.
and
Blank, Rome, Klaus & Comisky, Esqs.
By: Robert D. Kaplan, Esq.
Michael A. Davis, Esq.
(Pennsylvania Bar)
Attorneys for Falstaff Brewing Corporation.

Schneider, Cohen & Solomon, Esqs.
By: Edward A. Cohen, Esq.
Attorneys for Local No. 153, etc.

MEANOR, *District Judge*.

Local No. 153, International Brotherhood of Teamsters (hereinafter "Union") has moved to enforce an arbitration award against Falstaff Brewing Corporation (hereinafter "Falstaff"). Falstaff has filed a cross-motion seeking to reopen Civil No. 76-1383 and consolidate that matter with Civil No. 78-1483 (the Union's enforcement action). Falstaff also seeks to vacate the arbitration award. At a hearing on these motions held October 16, 1978, this court granted Falstaff's motion to reopen Civil No. 76-1383 and to consolidate it with Civil No. 78-1483. At that hearing, Falstaff was also granted leave to file an amended complaint in Civil No. 76-1383. After oral argument, I indicated to counsel that I would reserve decision on whether to enforce or vacate the arbitration award. I also stated that my then present intention was to enforce the award and announced that a formal opinion would be filed on November 3, 1978.

I

In April 1972, Falstaff purchased the right to brew beer under the Ballantine label. As part of this purchase, Falstaff took over Ballantine's retail customer lists and delivery routes, including 15,000 to 17,000 retail customer accounts. As a result of the purchase, the old Ballantine brewery in Newark, New Jersey was closed. After some deliveries from the warehouse in Newark, Falstaff established a retail distribution depot in North Bergen, New Jersey.

When the North Bergen Depot opened in May 1972, some 240 members of either Local 153, International Brotherhood of Teamsters or Local 843, International Brotherhood of Teamsters were employed as warehousemen, route drivers or trailer drivers at the Depot. In November 1972, following a Teamster decision to award all of the work of the Depot to Local 153, a Collective Bargaining Agreement (hereinafter "CBA") was executed and made effective from June 1, 1973 and to terminate May 31, 1976.

During the 28-month period from June 1973 until October 1975, the Depot employed approximately 140 Union members and serviced the North Jersey and Metropolitan New York, Staten Island and Western Long Island area. The work of the Depot involved deliveries from the North Bergen facility to the 15,000-17,000 retail customers which Falstaff acquired from Ballantine, and who were located in the above defined area. The deliveries were made with 33 retail delivery trucks in New York and 16 in New Jersey. One truck was used for each of Falstaff's 49 routes. Additionally, the work consisted of the warehousing for distribution to these customers of the Ballantine labeled product. This was the same work performed by the bargaining unit employees since the beginning of

the Depot in 1972, and was similarly performed by these identical employees as prior employees of Ballantine at the distribution center located at the former Ballantine brewery in Newark.

In 1974 and 1975, Falstaff faced a critical financial crisis. This crisis motivated a decision to curtail the operations of the North Bergen Depot starting on October 3, 1975—eight months prior to the termination date of the CBA. A meeting of Falstaff and Union representatives was called and the Union was advised of the curtailment. Within several days after the layoffs at the Depot began, Falstaff made arrangements with two independent distributors, Fatato in New York and Piccirillo in New Jersey, to distribute the company products in their respective states encompassing the territorial jurisdiction of the North Bergen Depot as set forth in the CBA. These distributors acquired the trucks from the Depot emblazoned with the Ballantine logo, hired some of the laid off route drivers and gained access to the Depot's customer lists. Additionally, the distributors were granted credit considerations by Falstaff toward the purchase of beer from Falstaff's Cranston, Rhode Island brewery.

The Union filed the following grievance:

> A dispute has arisen between the parties concerning the Company [Falstaff] contracting out of its delivery operations in violation of the various provisions of the Collective Bargaining Agreement.

On October 17, 1975, arbitration was commenced. The initial hearing was held before Arbitrator Paul W. Hardy on February 27, 1976 under the Rules and Regulations for Arbitration of the New Jersey State Board of Mediation. At this hearing the parties entered into a submission agreement:

> We the undersigned hereby agree to submit the following controversy to Arbitration: (No. persons involved 140)
>
> Has the Company violated the applicable provisions of the collective bargaining agreement set forth on page 30 of the collective bargaining agreement? If so, what shall be the remedy?
>
> * * *
>
> We hereby agree to submit such controversy for decision to PAUL W. HARDY.
>
> We further agree that we will faithfully abide by and perform any award made pursuant to this agreement and that such award shall be binding and conclusive upon us.

This submission agreement was signed by counsel for the parties.

The parties thereafter agreed to bifurcate the hearing and to first present evidence and argument relating to the issue of liability on February 27, 1976. On April 21, 1976, the arbitrator issued an "Opinion and Award" confined to the question of whether Falstaff had violated the pertinent provisions of the CBA as set forth in Article XVI at page 30. These provisions state:

> ANTI-DISCRIMINATION.
>
> * * *
>
> Except as otherwise may be agreed upon between the Depot and the Union, the bargaining unit work shall continue to be performed by the employees in the bargaining unit except that the washing of vehicles may be sub-contracted to an independent agency.
>
> * * *

> The delivery of products coming within the Falstaff local retail delivery operation in North Bergen, New Jersey, shall be the jurisdiction of Local 153.
>
> It shall be the Depot's policy to use available Depot equipment in preference to available outside equipment unless otherwise agreed upon by the Depot and the Union.

The arbitrator ruled for the Union, finding that Falstaff had failed to abide by the provisions of the CBA.

On July 16, 1976, Falstaff filed Civil No. 76-1383 in this court to vacate and set aside the arbitrator's "Opinion and Award". On September 2, 1976, this court stayed further proceedings in the action pending final conclusion of the continuing arbitration hearings. The case was "administratively terminated" on September 17, 1976, because of the ongoing arbitration. The termination Order was entered without prejudice to reopen at a later date.

The arbitration hearings resumed in August 1976, at which time various issues relating to remedy were heard. On January 20, 1977, the arbitrator issued an "Interim Award" which held, *inter alia,* that the CBA was still in effect and would remain so until May 31, 1977. Because of the finding that the CBA was extended for a year beyond the termination date set in Article XXII of the CBA, the arbitrator ordered that "the Company should cease and desist continuing to use distributors to distribute its Ballantine Falstaff labeled products in the New Jersey-New York metropolitan area previously serviced from its North Bergen depot." Interim Award, ¶ 1. Falstaff never complied with the cease and desist order.

The "Interim Award" further held that all employees laid off in October 1975 were entitled to monetary damages because they lost their employment due to Falstaff's violation of the CBA by converting to the use of independent distributors. Interim Award, ¶ 2. The arbitrator determined the method of calculating damages, Interim Award, ¶ 3, and made findings concerning health and welfare insurance coverage as well as pension credits due under the CBA. Interim Award, ¶ 4. Finally, the arbitrator held that the "[i]nterim Award shall guide the parties in the computation of damages . . .". Interim Award, ¶ 5.

After the filing of the "Interim Award", the arbitrator conducted hearings on the damages aspect of the case on various days from December 2, 1977 to April 18, 1978. On June 23, 1978, the arbitrator issued his "Final Opinion and Award" which reiterated the finding of the April 21, 1976 "Opinion and Award" that Falstaff violated the CBA, reaffirmed the contract extension finding of the "Interim Award", and fixed damages for back pay losses and loss of medical-insurance coverage suffered by the employees through May 31, 1977 in the amount of $1,560,189.31. The arbitrator further directed that Falstaff pay interest on that amount retroactive to June 1, 1977, at the rate of 7½% per year (.625% per month) and until payment of the damages is actually made to counsel for the Union. "Final Opinion and Award" at 15. (The entire text of the "Final Opinion and Award" is attached as an Appendix to this opinion.)

The contractual provisions authorizing and limiting arbitration are contained in Article XI of the CBA:

> A grievance within the meaning of the grievance procedure shall be defined as any difference between the Depot and the employees covered by this Agreement or between the Depot and the Union as to: (a) any matter relating to wages, hours of work or working conditions covered by this Agreement, and (b) any matter involving the interpretation, application or claimed violation of this Agreement.
>
> ° ° °

STEP 4

* * *

The decision of the arbitrator which shall not be in violation of any applicable law or regulation shall be final and conclusive on the Depot, the Union, the Grievant and all employees. The arbitrator shall have no power to add to or subtract from or modify any of the terms of this Agreement or any Agreement made supplemental thereto.

Falstaff submits that rulings of the arbitrator in the "Opinion and Award", the "Interim Award" and the "Final Opinion and Award" are either contrary to law or in excess of his authority under the CBA, the submission agreement, or both. As a result, Falstaff urges this court to vacate the arbitration award. At issue are damages of $1,560,189.31 to be paid to the Union plus interest at 7½% per year until payment is actually made. To date, there has been no payment. The Union contends that the awards are within the law as well as within the arbitrator's authority, and should be enforced.

Falstaff presents the following issues for determination by this court:

A. Does the Arbitrator's award fail to draw its essence from the collective bargaining agreement in that it directly obstructs the Company's Cranston, Rhode Island, operations which are not covered by that agreement?

B. Does the Arbitrator's interpretation and application of the collective bargaining agreement violate federal antitrust and labor law in that it prohibits the Company from doing business with independent distributors at its Cranston, Rhode Island, facility?

C. Did the Arbitrator exceed his authority by ruling that the Company violated the collective bargaining agreement by permitting independent distributors to purchase beer at its Cranston, Rhode Island, facility?

D. Does the Court rather than the Arbitrator have jurisdiction to determine whether the Union terminated the collective bargaining agreement as of May 31, 1976?

E. Did the collective bargaining agreement terminate on May 31, 1976, in accordance with its own terms and based on the actions of the parties?

F. Assuming *arguendo* that the Arbitrator had jurisdiction to decide the contract extension issue, did he act arbitrarily and unreasonably in ruling that the agreement continued an additional year beyond its stated term?

G. Did the Arbitrator exceed his authority by failing to measure back pay by the amount of work actually performed by the distributors?

H. Did the Arbitrator err in imposing interest?

After consideration of and reflection upon the arguments of counsel and the voluminous documents and memoranda submitted in support thereof, it is the decision of this court that the "Final Opinion and Award" of the arbitrator shall be enforced in its entirety.

II

Before reaching any of the issues framed by Falstaff, this court must examine the threshold question of its own scope of review of arbitration awards in light of the law and public policy behind arbitration proceedings.

In *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U. S. 593 (1960), the third case decided in the landmark "Steelworkers Trilogy", the Supreme Court outlined the role of the judiciary in reviewing an arbitrator's interpretation of a collective bargaining agreement as follows:

> [T]he question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his. *Id.* at 599.
>
> * * *
>
> Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may, of course, look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. *Id.* at 597.

See generally, St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at "Enterprise Wheel" and Its Progeny,* 75 Mich. L. Rev. 1137 (1977).

Enterprise enunciated a basic philosophy that was to apply to all other labor arbitration cases. It elevated the arbitrator to an exalted status—emphasizing that there would be no interference with his award simply because a reviewing court differed with him in its interpretation of the provisions of the contract. At the same time it held a checkrein on him—confining his zone of action to the four corners of the collective bargaining agreement. *Ludwig Honold Mfg. Co. v. Fletcher,* 405 F. 2d 1123, 1126 (3d Cir. 1969).

In *Honold,* the Court of Appeals formulated the standard that this Circuit now applies in translating the "essence" test into the appropriate extent or limitation of judicial review of the arbitrator's interpretation. The *Honold* panel held:

> that a labor arbitrator's award does "draw its essence from the collective bargaining agreement" if the interpretation can in any rational way be derived from the agreement, viewed in the light of its language, its context, and any other indicia of the parties' intention; only where there is a manifest disregard of the agreement, totally unsupported by principles of contract construction and the law of the shop, may a reviewing court disturb the award.

Id. at 1128.

The *Honold* court stressed the Circuit's awareness of and concern for the strong public policy of encouraging the peaceful settlement of industrial disputes by means of the arbitration device. That court concluded that the Supreme Court's philosophy of restricted review at the very least means that the interpretation of labor arbitrators must not be disturbed so long as they are not in manifest disregard of the law, and that "whether the arbitrators misconstrued a contract" does not open the award to judicial review. *Id.* The Court of Appeals recently reaffirmed the *Honold* standard in *International Brotherhood of Teamsters, Etc. v. Western Pennsylvania Motor Carriers Assoc.,* 574 F. 2d 783 (3d Cir. 1978).

Here, Falstaff and the Union entered into the CBA in June 1973. The submission agreement signed by the attorneys for the parties stated:

> We further agree that we will faithfully abide by and perform any award made pursuant to this agree-

> ment and that such award shall be binding and conclusive upon us.

Thus, there can be no doubt that Falstaff agreed to submit the controversy to the arbitrator and further agreed to be bound by his findings and remedies. Where parties to a collective bargaining agreement have provided that arbitration shall be the final and binding method for settling grievances, the arbitration award is generally nonreviewable by a court. This serves the legislative policy of allowing the parties to a collective bargaining agreement to determine in advance the desired method of grievance resolution. *Westinghouse Elevators of Puerto Rico, Inc. v. S. I. U. de Puerto Rico,* No. 78-1059 (1st Cir. filed Sept. 27, 1978), Slip Op. at 3-4.

The essence of the arbitration process is that an arbitral award shall put the dispute to rest. Finality is the ideal that Congress has endorsed:

> *Final* adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement.

Labor-Management Relations Act § 203(d), 29 U. S. C. § 173(d) (1970) (emphasis added). Accordingly, when the losing party in arbitration asks a court not to give effect to an award, it is asking that the conclusiveness which is at the heart of the process be withheld. The core considerations seem clear. First, the parties have contracted for a final and binding award; the party who resists adherence to it is therefore seeking to be relieved of his bargain. Second, whether judicial intercession results in enforcement or vacation of the award, expediency in the resolution of the dispute is lost. Comment, *Judicial Deference to Arbitral Determinations: Continuing Problems of Power and Finality,* 23 U. C. L. A. L. Rev. 936, 949 (1976). The "binding and conclusive" provision of the submission agreement between Falstaff and the Union could not be clearer in evidencing their intent to put this dispute to rest through the arbitral process.

In its complaint filed in Civil No. 76-1383, Falstaff invokes this court's jurisdiction under Section 301 of the Labor Management Relations Act of 1947, 29 U. S. C. § 185, as well as other statutes (including the Federal Arbitration Act, The Sherman Act and the diversity statutes). The Supreme Court has defined the scope of judicial inquiry under § 301 of the LMRA as follows:

> [T]o be consistent with congressional policy in favor of settlement of disputes by the parties through the machinery of arbitration, the judicial inquiry under § 301 must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator power to make the award he made.

United Steelworkers v. Warrior & Gulf Navigation Co., 363 U. S. 574, 582 (1960). Citing the above statement from *Warrior & Gulf,* this court through Judge Fisher in *Local 701 v. Needham's Motor Service, Inc.,* 82 LRRM 2412 (D. N. J. 1972), held that a submission agreement submitting a dispute to arbitration for a final and binding decision constituted a waiver of the right of the parties to have the dispute settled by any tribunal other than the arbitrator upon whom jurisdiction was granted through the submission agreement. An agreement that an arbitration award shall itself be final and binding upon the parties generally precludes judicial review. *Monte v. Southern Delaware County Authority,* 335 F. 2d 855, 857 (3d Cir. 1964).

An eminently practical approach for any respondent in arbitration who believes the arbitrator lacks jurisdiction is to preserve explicitly his challenge to jurisdiction and to declare that his challenge will be presented to a court if there is an adverse decision on the merits. St. Antoine, *Judicial Review of Labor Arbitration Awards, supra,* 75 Mich. L. Rev. at 1151. Courts respect such reservations and do not accord the resulting awards the usual presumption of legitimacy. *Local 719, American Bakery Workers v. National Biscuit Co.*, 378 F. 2d 918 (3d Cir. 1967). The record before this court reveals no such challenge to the arbitrator's jurisdiction coupled with any statement preserving such a challenge for review by a court.

Falstaff contends that the arbitrator has exceeded his authority under the contract and that his award fails to draw its essence from the CBA. In *NF&M Corporation v. United Steelworkers of America,* the Court of Appeals for the Third Circuit noted:

> An arbitrator is not required to list his reasons for the award, nor should an ambiguity in his opinion be seized upon to support an inference that he exceeded his authority. Further, a court is precluded from overturning an award for errors in assessing the credibility of witnesses, or in the weight accorded their testimony, or in the determination of factual issues.

524 F. 2d 756, 759 (3d Cir. 1975). Accordingly, for this court to the determination whether the arbitrator's award draws its essence from the CBA, it may look to the Agreement itself and the arbitrator's award, but it may not give *de novo* review to the merits of the arbitrator's construction of the CBA. To accept a view that the courts could, under the standard arbitration clause, review the merits

of every construction of the contract would make meaningless the provisions that the arbitrator's decision is final, for in reality it would almost never be final. *Enterprise Wheel and Car Corp., supra,* at 598-599. Constrained by the narrow scope of review permitted under the *Honold* standard, this court may now proceed to examine the issues as presented by Falstaff.

III

In issues A, B and C (page 7 of this opinion), Falstaff raises for consideration the effect of the CBA on the company brewery at Cranston, Rhode Island. Falstaff urges that the arbitrator's award directly obstructs the Cranston operations which are not covered by the CBA. Falstaff additionally contends that the arbitrator's interpretation and application of the CBA violates Section 1 of the Sherman Act, 15 U. S. C. § 1 (Supp. 1978), and Section 8(e) of the National Labor Relations Act, 29 U. S. C. § 158(e) (1973), in that it prohibits Falstaff from selling beer for resale to independent distributors at the Cranston facility.

It is significant that never before, throughout the liability phase of the arbitration proceedings, had Falstaff ever raised the issue of the CBA's effect on the Cranston brewery. In *Mogge v. District 8, International Ass'n of Machinists,* 454 F. 2d 510 (7th Cir. 1971), a panel of the Court of Appeals for the Seventh Circuit (which included the now Mr. Justice Stevens) held that where a party to an arbitration proceeding fails to bring certain matters to the arbitrator's attention, that party when seeking to vacate the award may not supplement the record before the court. That court noted in language most applicable in the case at bar:

> The national labor policy of encouraging private arbitration of labor disputes, because of its potential for

> expeditious disposition of these matters without resort to the courts, has been thwarted in this protracted case. To allow [defendant], after arbitration, to have the court supplement the record with information that was available at the time of arbitration would further undermine the very purpose of private arbitration. We have concluded that these matters were never properly preserved for appeal.

Id. at 513.

Falstaff contends that the CBA, as interpreted by the arbitrator, forecloses the independent distributors from the market and constitutes an unlawful concerted boycott. Additionally, Falstaff contends that the resale by independent distributors of beer produced at the Cranston plant is not work "fairly claimable" by the bargaining unit, and that Section 8(e) of the National Labor Relations Act makes illegal the Falstaff-Union contractual provision, interpreted by the arbitrator to require Falstaff to refuse to deal with independent distributors. In response, the Union contends that the provisions on page 30 of the CBA which were the subject of the arbitration proceedings, were primary work preservation provisions, and that such a provision in a collective bargaining agreement has never been held violative of the Sherman Act.

Following both the arbitrator's "Opinion and Award" of April 21, 1976, and the "Interim Award" of January 20, 1977, Falstaff filed charges with the National Labor Relations Board advancing the contention that the arbitrator's interpretation of these provisions made them lose their status as primary work preservation provisions. Additionally, Falstaff urged that the arbitrator's ruling that all employees were entitled to damages from the conversion to independent distributors was "evidence" that they were

not still primary work preservation provisions. Following investigation by the Regional Director of the N. L. R. B., each charge was dismissed.

In *International Brotherhood of Teamsters, Local No. 153 (Falstaff Brewing Corp.)*, NLRB Case No. 22-CE-36, the dismissal letter of November 11, 1976 stated:

> In this regard, it was noted that the contractual provisions, set out on page 30 of the collective bargaining agreement, are lawful on their face and that nothing in Arbitrator Hardy's decision warrants a different conclusion. It was also noted that Local 153 had both during the arbitration hearing of August 23, 1976 and in subsequent correspondence to the arbitrator specifically disclaimed any intent of work acquisition and limited its position in the pending damages portion of the arbitration matter to that of merely preserving the unit work of the North Bergen depot employees. As the Board has held that Section 8(e) of the Act does not bar contractual provisions which merely seek to preserve for employees traditional bargaining unit work the agreement was deemed to be lawful in this regard.

(Citations omitted.) On January 24, 1977, an appeal taken by Falstaff from this decision was denied by the Office of Appeals for the reasons stated by the Regional Director.

Falstaff filed the same charge after the arbitrator's January 20, 1977 "Interim Award" in which he found that all depot employees terminated after October 3, 1975 were entitled to back pay and that the measure of damages was based upon their prior average earnings. The N. L. R. B. Regional Director's dismissal letter in this case, NLRB Case No. 22-CE-37, under the same caption, issued March 8, 1977, stated:

> In Case No. 22-CE-36 involving the instant parties, I determined that the same contract as interpreted by Arbitrator Hardy's decision of April 21, 1976 determining the merits of the parties' dispute was not violative of Section 8(e) of the Act but rather was merely a construction limited to preserving the unit work of the North Bergen depot employees. At that time I noted that Local 153 had specifically disclaimed any intent of work acquisition and limited its position before Arbitrator Hardy to that of seeking merely to preserve unit work. Subsequent to his decision of January 20, 1977, Local 153 has reaffirmed their positions. In light of this and noting that Local 153 has not taken any action inconsistent with that position, I have determined that the contract as interpreted by the January 20, 1977 decision is a lawful unit work preservation agreement.

(Citations omitted.)

> You also contended that the arbitrator, in finding that all 140 employees, employed at the time Falstaff used independent distributors exclusively, are entitled to back pay, thereby disclosed that Local 153 is seeking more than the preservation of unit work. In this connection, you have noted as relevant that the present volume of work done by the independent distributors is only approximately one-half of the amount which had been done at the North Bergen facility, when it was operative. I find no merit to this contention as the arbitrator's award is clearly limited to damages incurred by Falstaff's *converting* to the use of independent distributors and as Local 153 has clearly limited the award to unit work lost.

(Emphasis in original.)

On April 12, 1977, an appeal taken from this second decision by Falstaff was denied by the Office of Appeals for the reasons stated by the Regional Director. This concluded the N. L. R. B. proceedings in this case.

It is obvious that the N. L. R. B. has concluded that the page 30 provisions are lawful unit work preserving agreements. Such a work preservation provision of a collective bargaining agreement, protected by Section 8(e) as a proper negotiated condition of employment, cannot be a violation of the Sherman Act. In *Federal Maritime Commission v. Pacific Maritime Assn.*, 435 U. S. 40, 57 (1978), the Supreme Court set forth the general status of the interaction of the Sherman Act and the labor exemption to that Act:

> [Ordinary collective bargaining agreements establishing wages, hours, and working conditions in a bargaining unit] are the product of bargaining compelled by the labor laws, which themselves were enacted pursuant to the power of Congress to regulate commerce in the public interest. They are also the kind of contracts that the courts, because of the collective bargaining regime established by the labor laws, in the main have declared to be beyond the reach of the antitrust laws, the statutes specifically designed to protect the commerce of the United States from anticompetitive restraints.

In holding that legitimate working conditions set forth in collective bargaining agreements do not violate the Sherman Act, the Supreme Court has repeatedly stated that "Congressionally permitted union activities may restrain trade in and of themselves," but remain lawful. *Ramsey v. United Mine Workers*, 402 U. S. 302, 313 (1971); *Allen Bradley Co. v. Local Union No. 3, IBEW*, 325 U. S. 797, 811 (1945).

In the instant case, we are dealing with the normal collective bargaining relationship, a CBA between one union and one employer covering actual employees working out of a single job site (the North Bergen Depot), and a primary job preservation provision which the N. L. R. B. has already found to be lawful both as written and as applied by the arbitrator here. *Cf. Connell Construction Co. v. Plumbers Local 100,* 421 U. S. 616 (1975).

Falstaff's attempt to vacate the arbitration award based upon its view that the arbitrator's interpretation of the page 30 provisions constitutes a violation of Section 1 of the Sherman Act and Section 8(e) of the National Labor Relations Act is without merit. The argument advanced by Falstaff that the arbitrator's "Interim Award" finding that the company "should cease and desist continuing to use distributors to distribute its Ballantine Falstaff labeled products in the New Jersey-New York metropolitan area previously serviced from its North Bergen depot", exceeded his authority under the CBA is, at best, transparent. Examination of the language of the "Interim Award" reveals that the "cease and desist" finding is in the context of determining that the CBA was effective until a certain date, May 31, 1977. It is obvious that the arbitrator's prohibition of independent beer distribution was limited to the effective dates of the CBA. There is simply no way to construe the language of the arbitrator as extending the prohibition beyond May 31, 1977. Thus, the prohibition was derived from the very essence of the CBA—from the page 30 work preservation provisions and from the termination provision of Article XXII. Moreover, the "cease and desist" finding was in the "Interim Award" which Falstaff ignored. There is no "cease and desist" language included in the "Final Opinion and Award". In this last award, the arbitrator directed Falstaff to pay back pay and

damages, and to supply lost pension credits to employees; that is all. Falstaff's contention that the arbitrator's interpretation of the CBA interfered with the operations of the Cranston brewery may have been an issue earlier in the arbitration proceedings. However, the issue was never raised in the liability phase, Falstaff never complied and thus was not prejudiced, and the CBA has now expired rendering the issue moot.

Issues C, D and E advanced by Falstaff (page 7 of this opinion) pertain to the arbitrator's finding that the contract was extended an additional year, to May 31, 1977 by the terms of Article XXII. This termination clause states:

> TERMINATION
>
> This Agreement shall be in full force and effect from June 1, 1973 to and including May 31, 1976, and shall automatically continue from year to year until either party serves written notice on the other party sixty (60) days prior to any annual expiration date that changes are desired herein and that the desired changes will be submitted thirty (30) days prior to the expiration. During the term of this Agreement, the employees represented by the Union and its members will continue to work without strike.

Here, Falstaff contends that the arbitrator never had jurisdiction to arbitrate the issue of contract extension, and that such an issue could only be properly before a court. On the assumption that *this court* accepts that proposition, Falstaff then argues the merits of whether the CBA expired on May 31, 1976, in accordance with its own terms, based upon the actions of the parties. Falstaff then concludes by asserting that, if the arbitrator did have

jurisdiction, he decided the issue in an arbitrary and unreasonable manner.

Falstaff's assertion that the arbitrator lacked jurisdiction to arbitrate the issue is unsupportable. Although Falstaff vigorously claimed throughout the damages phase of the proceedings that the CBA expired on May 31, 1976 as a matter of law, it never raised the question of arbitrability in any of its extensive memoranda nor in the testimony before the arbitrator. The record demonstrates that the merits of the issue of contract termination or extension was, *by express stipulation* of both Falstaff and the Union, submitted to the arbitrator for decision without reservation or qualification. Additionally, the record indicates that Falstaff (along with the Union) strongly urged the arbitrator to decide the merits in his arbitration award of the issue because such a decision was vital to damage calculations that would have to be made. The transcript of the August 23, 1976 hearing before the arbitrator includes the following statement by Kenneth F. Kahn, Esq. of the Philadelphia firm Blank, Rome, Klaus & Comisky representing Falstaff:

> Mr. Kahn: I think Ed [Cohen, the attorney for the Union] and I both have certain stipulations which we can present to you on matters which we need some guidance on in terms of a preliminary award on the damages so that we can, therefore, proceed and calculate what would be due. I think the first question is whether the Collective Bargaining Agreement terminated on May 31, 1976 or whether it still continues in full force and effect. Number two would be. . . .

Transcript at 56-57.

In its post-hearing memorandum, Falstaff urged the arbitrator to decide the issue and specifically refers him

to the arguments on the merits submitted in Falstaff's pre-hearing memorandum. Post-hearing Memorandum at 2. Thus, the issue of whether or not the CBA had actually expired, or continued beyond May 31, 1976, was the first stipulated issue presented to the arbitrator at the hearing on the damages phase of the case. The issue of arbitrability was never posed at all. Even on the final day of hearing, April 18, 1978, when Falstaff moved to reargue to the arbitrator his prior rulings on several issues, including the CBA termination issue, there was no claim of lack of jurisdiction or want of arbitrability. Accordingly, Falstaff's argument to this court that the termination issue was not arbitrable must fail. Both parties clearly submitted the issue to the arbitrator.

The merits of the contract extension issue do not bear more than cursory examination by this court once it has been determined that the arbitrator did, indeed, have the power and authority to decide the issue. *See* Part II of this opinion on this court's scope of review of an arbitration award involving contract interpretation. The "Final Opinion and Award" sets forth the arbitrator's findings and rationale behind construing the Termination clause to extend the CBA until May 31, 1971. Appendix at 6-7. In light of the arbitrator's analysis of the facts presented to him, this court concludes that it is logically possible to interpret Article XXII the way the arbitrator did. My subjective opinion as to the proper construction or application of the clause is of no moment here. *General Teamsters, Chauffeurs and Helpers, Local Union No. 249 v. Potter-McCune Company,* 412 F. Supp. 8, 11 (W. D. Pa. 1976). Certainly, the arbitrator had grounds upon which to base his interpretation. *Cf. H. K. Porter Co., Inc. v. United Saw, File and Steel Products Workers of America,* 333 F. 2d 596, 602 (3d Cir. 1964). Whether such an interpretation is the best interpretation is not a

matter for this court. *Enterprise Wheel and Car Corp., supra,* at 599.

Issues G and H presented for consideration by Falstaff (page 7 of this opinion), raise the damages and interest award for this court's scrutiny. Falstaff contends that the arbitrator exceeded his authority by failing to measure back pay by the amount of work actually performed by the independent distributors who replaced the laid off members of the bargaining unit. Falstaff also asserts that the arbitrator erred in imposing interest.

The appropriate measure of damages was also an issue that was stipulated to at the August 23, 1976 hearing. Each side outlined its various theories of how to measure the damages both at the hearing and in subsequently submitted memoranda. (Falstaff's memo on damages runs a remarkable 133 pages.) Falstaff now contends that the "arbitrator applied a faulty method to determine loss of wages and back pay." Falstaff Brief at 80. This is very simply a situation where the arbitrator did not accept any of the various damages theories put forth by Falstaff. The arbitrator found, in the "Final Opinion and Award" that:

> The proper measure of monetary damages in this type of case is based upon lost earnings, if any, and damages for loss of medical insurance coverage, if any, to all employees laid off as a result of the Company's wrongful conversion to the use of independent distributors. The hearings between December, 1977 and April, 1978 supplies the evidence necessary for the calculations. I find that all of the employees being given relief are entitled to relief for the Company's violation of the Agreement.

Final Opinion and Award at 8-9.

The argument that Falstaff advances here, that the measure of damages should be based upon the amount of

product distributed through the independent distributors, is the same argument made before the N. L. R. B. in the claim that the "Interim Award" violated Section 8(e) of the National Labor Relations Act. The Regional Director disagreed on March 8, 1977 and dismissed Falstaff's complaint, holding:

> I find no merit to this contention as the arbitrator's award is clearly limited to damages incurred by Falstaff's *converting* to the use of independent distributors and as Local 153 has clearly limited the award to unit work lost.

(Emphasis in original)

The facts here indicate that Falstaff had contractually agreed that the unit employees would continue, for the duration of the CBA, to distribute the beer to Falstaff's 15,000-17,000 retail customers of the Depot, and that Falstaff would use its own trucks for that purpose, as distinguished from having independent distributors do so, using their employees and trucks. This is what Falstaff promised the employees in agreeing to the work preservation provisions on page 30 of the CBA. The arbitrator found in his awards that this promise was breached when Falstaff began distributing its products to those same retail customers of the Depot through independent distributors. Falstaff had agreed with the Union and the employees that, if it was going to distribute Ballantine beer at all to those retail customers, its own employees would do so and they need not fear losing their jobs by a company conversion to independent distributors.

The arbitrator limited the damages to the unit work lost. This measure of damages was arbitrated in a series of hearings with the positions of the parties supported by lengthy pre-hearing and post-hearing memoranda. The

submission agreement requested the arbitrator to determine the appropriate remedy. Both arbitration awards and N. L. R. B. decisions have used the same measure of damages as applied here. *See, e.g., Sidele Fashions, Inc.*, 36 LA 1364, 1384 (1961); *Winchester Electronics, Inc.*, 128 N. L. R. B. No. 110, 46 LRRM 2013 (1960), *modified, N. L. R. B. v. Winchester Electronics, Inc.*, 295 F. 2d 288 (2d Cir. 1961).

Here, the CBA is silent on matters of remedy and does not explicitly limit the arbitrator in this regard. In *Enterprise Wheel and Car Corp., supra,* at 597, the Supreme Court addressed the issue:

> When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations. The draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency.

This court has no doubt that the arbitrator was well within the bounds of his authority to fashion the remedy of the "Final Opinion and Award". *See, Newark Wire Cloth Co. v. United Steelworkers,* 339 F. Supp. 1207 (D. N. J. 1972); *Shahmoon Ind., Inc. v. United Steelworkers of America,* 263 F. Supp. 10 (D. N. J. 1966).

On the issue of interest, Falstaff contends that since the CBA is silent on the imposition of interest in a damages award, the award of interest is barred. Falstaff also urges that the imposition of interest is punitive and unwarranted. These contentions are specious; the language of the "Final Opinion and Award" is most clear and dispositive:

> The parties empowered the Arbitrator in the arbitration submission agreement to determine the proper remedy for the violation. Interest is not a penalty against the Company. Its function is to make the employees reasonably whole, and that is the proper remedy. I am also mindful of the long time that has passed since the layoff of the employees.

Final Opinion and Award at 14. Interest is within the traditional inherent powers of an arbitrator to award in order to make an employee whose rights have been violated reasonably whole.

For the foregoing reasons, the Union's motion to enforce the arbitrator's "Final Opinion and Award" is granted in its entirety. The court will enter its own Order and Final Judgment.

DATED: November 3, 1978.

Appendix to Opinion appears as Appendix E A34 to A54 *infra.*

APPENDIX E.

Final Opinion and Award of the Arbitrator.

NEW JERSEY STATE BOARD OF MEDIATION

Case No. 75-293

In the Matter of Arbitration
Between
FALSTAFF BREWING CORPORATION
and
LOCAL 153, I. B. T.

Final Opinion and Award.

The undersigned was appointed by the New Jersey State Board of Mediation as Impartial Arbitrator to hear and decide the matters described herein, in accordance with the provisions of the Collective Bargaining Agreement calling for final and conclusive arbitration of disputes. The parties were afforded full opportunity to present all evidence and make all arguments they deemed pertinent.

This has been a long and complicated case, involving many issues, and has required more thought and study on some issues than can possibly be reflected in this Final Opinion. The large number of hearings could have been multiplied several times over were it not for the skill and cooperation of the attorneys for both sides in identifying and clarifying issues, preparing detailed affidavit forms for each employee to use and making tedious calculations

necessary for the computation of damages for each employee. This greatly simplified my task and allowed me to give greater concentration to the contractual and damage issues in dispute.

All the hearings were transcribed, and I have carefully examined and re-examined the transcripts, the exhibits, the briefs and weighed all of the testimony and arguments. It is not necessary to cover each and every point raised, but I can assure the parties that nothing has been overlooked and the disposition of issues not discussed is implicit from the outcome. Some of the more important points I will discuss below.

In resolving the issues of contract interpretation and application, the factual disputes, extent of employee damages, extension of the Agreement, mitigation of damages, offsets and all other areas raised, I am called upon to utilize my own expertise as an Arbitrator. This is what both parties bargained for in providing for final and conclusive arbitration of their disputes in their Agreement. While I have given consideration to the authorities cited to me by the parties, I am not necessarily bound by them. I have applied principals I have found to be proper and correct under the facts and circumstances presented here, sometimes agreeing and sometimes disagreeing with what has been cited to me. The meaning and application of the terms used in the Collective Bargaining Agreement and in the arbitration submission agreement, where in dispute, I have to resolve as in any other case. My power and responsibilities stem from these agreements.

The initial hearing took place on February 27, 1976 and was limited by agreement of the parties, to the issue whether the Company had violated provisions of the Collective Bargaining Agreement in its curtailment of operations at the North Bergen Depot, layoff of employees, and

use of independent distributors for the products previously distributed from the Depot. I issued my initial Opinion and Award on April 21, 1976, finding violations of the Collective Bargaining Agreement. I retained jurisdiction, by agreement of the parties, over the question of the proper remedy.

The next hearing took place on August 9, 1976 with both parties submitting to me various issues for advance rulings so that monetary damages could be calculated. Included in these issues was the question whether the Agreement had terminated on May 31, 1976 or had been extended under Article XXII to May 31, 1977 by the conduct of the parties, and a dispute over the number of employees entitled to damages. The Arbitrator issued an Interim Award, on the matters presented, on January 20, 1977. I retained jurisdiction over the rest of the case. In that Award, at the request of the Union, I directed the Company to cease and desist its use of the independent distributors for the metropolitan area previously serviced from the Depot. The Company did not comply but the Union did not pursue this matter with me. It is of no consequence in this Opinion and Award, except it would have terminated the period of employees damages at a date earlier than May 31, 1977.

The parties were still unable to settle the matter of monetary damages and other remedies, so the Arbitrator conducted further hearings on December 12, 1977, January 11, 12 and 13, 1978, February 15, 1978, March 1, 3, 9 and 29, 1978 and April 6 and 18, 1978. In addition, on March 6, 1978 by agreement of both parties with the Arbitrator, testimony was taken of employees previously scheduled to testify that day in my absence but to be considered part of the hearing record in the case. As the Arbitrator agreed, he has carefully reviewed that transcript.

As previously stated, the parties had cooperated in the preparation of affidavit forms for each employee to use to set forth detailed information as to his individual monetary claims. These were submitted in evidence by the Union. Most of the hearing time begining in December, 1977 involved testimony by some 120 employees having monetary claims, including a review of their income tax returns, medical insurance loss documentation, unemployment compensation forms, cancelled checks and the like. Emphasis was also placed on questions regarding mitigation of damages (efforts to obtain other employment following their termination by the Company). Much time was also devoted to arguing issues which arose from their testimony and re-arguing issues previously decided in the January 20, 1977 Interim Award. The Arbitrator ruled on many issues during the course of the hearings.

Except for the testimony and documentation obtained by the Company in questioning the employees themselves, the Company produced no other evidence concerning the propriety of any employee monetary claim as to mitigation and set-off. Two of the employees having monetary claims died prior to the hearings which began in December, 1977. Their affidavits have been examined. The remaining employees were not called to testify because they only sought additional pension credits, or made no claims.

The April 21, 1976 Opinion and Award, and the January 21, 1977 Interim Award are to be considered a part of this Final Opinion and Award.

I. Background:

Briefly stated, in April of 1972 the Company purchased the Ballantine label, some of its equipment, the customer delivery lists, and took over the employment of

many of the Ballantine warehouse and delivery personnel. Most of the employees had many years of service with Ballantine at the Newark, New Jersey Brewery and were of relatively advanced age. The Company did not take over the Newark Brewery but moved the distribution operation to a Depot in North Bergen, New Jersey. It serviced from said Depot some 15,000 to 17,000 delivery customers in New Jersey, New York City, Staten Island and western Long Island metropolitan area, largely former customers of Ballantines. The beer was shipped to the North Bergen Depot from other Company Breweries.

The Company entered into a Collective Bargaining Agreement with the Union effective from June 1, 1973. Said Agreement sets forth in Article XVI, strong language prohibiting the Company from having the bargaining unit work, except washing of trucks, performed by anyone but bargaining unit employees. It also sets forth an agreed upon policy that available Depot equipment be used in preference to available outside equipment. It provides that the delivery operation be the jurisdiction of the Union.

In the Arbitrator's April 21, 1976 decision, the Arbitrator found that "While the Agreement between the parties does not prohibit the Company from removing its product from the New York-New Jersey Metropolitan area, in my judgment, it dictates the method of distribution that must be followed if the products are to be marketed in that area", and that "The only mode of distribution of the Company's beer and ale permitted by the Collective Bargaining Agreement for retail delivery to customers in the area is through Company trucks and equipment with unit employees". The Arbitrator stated that the Agreement "specifically precludes the use of 'outsiders' such as independent contractors to perform the work that contractually is under the jurisdiction of Local 153".

The evidence revealed that the Company did not really consider the language of the Agreement when, starting October 3, 1975 it began curtailing the Depot's operations, laying off its employees, and commencing distribution through independent distributors, one in New Jersey and the other in New York.

II. CONTRACT EXTENSION:

This issue was decided in the Arbitrator's Interim Award of January 20, 1977. The Arbitrator heard further arguments and passed upon further motions on the subject near the conclusion of the hearing on April 18, 1978.

The Arbitrator does not agree with the Company's interpretation and application of Article XXII. Both parties agree the language is unusual. In my view, it certainly is. It requires the Agreement to continue in effect for another full year, from year to year, until certain steps are taken to amend or terminate it. The Arbitrator cannot agree with the Company that all a party need do is send a 60-day written notice that it desired changes and simple promise in the notice that the desired changes will be submitted to the other, 30 days prior to the expiration. That interpretation strains industrial practice and reality. According to the Company, the promise the 30-day proposals need not be followed up by actual submission of the proposals by the party giving the 60-day notice.

The Company never sent any 60-day notice to the Union of any desire to change or terminate the Agreement. As late as February 27, 1976 it presented testimony in this case that it had no intent to close the Depot. Under the circumstances, it certainly should have sent a 60-day written notice if it wished to terminate the Agreement.

The Company relies on the Local's 60-day written notice sent on March 11, 1976. That notice of a desire

to make changes in the Agreement does not contain a promise that the changes will be submitted 30 days prior to the expiration. It simply said in the "near future". The Union never submitted any 30-day proposals, leaving the Agreement in force for another year without change.

The Arbitrator interprets Article XXII to mean not only that the party give a 60-day written notice to the other to change or terminate the Agreement, but the party giving the notice to change the Agreement must follow through by actually submitting its proposals to the other by 30 days prior to the expiration. I agree with the Union in this regard. If the party giving the 60-day notice does not follow through with its 30 day proposals, the Agreement automatically continues for another year without change. The Union did not promise them within 30 days and did not submit them at all. This is why the Arbitrator concluded, in the Interim Award, that the Agreement was not terminated as obligated by the language of Article XXII.

The Arbitrator agreed with the Union that the cases under the National Labor Relations Act are not helpful here. The peculiar requirements of Article XXII, not found in that Act, must govern in this case. The Arbitrator is bound by the requirements of the Collective Bargaining Agreement.

Also, as the Union argues, had it claimed that the Agreement expired on May 31, 1976, after giving the 60-day written notice but without ever having submitted any 30 day proposals, and began to strike the Company over a "new" Agreement, I would have no difficulty with a Company grievance in finding that the strike was improper. I would have found that the Agreement had not been properly terminated under the terms and conditions set forth in Article XXII. I cannot reach a different conclusion merely because the positions of the parties are reversed in this case. The meaning of the Agreement does not change.

III. Theory of Damages:

The Arbitrator concluded in his Interim Award that "All employees laid off in October, 1975 and thereafter are entitled to monetary damages". The last Depot employees were laid off on or near May 31, 1976. The Arbitrator remains well-satisfied that the layoffs of these employees was a direct result of the Company's violation of the Agreement in converting to the use of independent distributors to distribute to the retail customers of the Depot. Re-argument did not change his mind.

The Company asked the Arbitrator to limit damages to some smaller number of employees, or smaller amounts to each employee based upon the amount of beer distributed through the independent distributors between October, 1975 to May, 1977. The Company offered to reconstruct each delivery, route and driver, apparently on a day to day basis, based upon the deliveries actually made by the distributors. It claims that many retail customers previously serviced from the Depot were lost or abandoned following the conversion to distributors. Apparently the media advertising campaign the Company began in New Jersey and New York after turning to the distributors was not overly successful.

The Union argues that the time and expense of such a reconstruction is unreasonable, and that the reconstruction is not possible because of route bidding procedures, seniority rights, and the like. With this the Arbitrator agrees.

Moreover, I do not believe that in a case of this sort the damages to the employees should depend upon whether

the conversion to independent distributors was or was not successful, or whether it resulted in more products or less products being distributed to retail customers, or whether the drivers or salesmen employed by the distributors were better or worse or more efficient or less efficient than those employed at the Depot. Every mode of distribution has its own effect upon the volume of distribution for better or worse.

The proper measure of monetary damages in this type of case is based upon lost earnings, if any, and damages for loss of medical insurance coverage, if any, to all employees laid off as a result of the Company's wrongful conversion to the use of independent distributors. The hearings between December, 1977 and April, 1978 supplies the evidence necessary for the calculations. I find that all of the employees being given relief are entitled to relief for the Company's violation of the Agreement.

IV. Mitigation of Damages:

The parties agree that the employees, upon being laid off by the Company, had a duty to attempt to mitigate their damages. The Arbitrator has had to pass upon this type of issue in many dicharge or layoff cases. The obligation of the employees was to make reasonable attempts to obtain other reasonable employment. What is or is not reasonable depends on many factors, and was the subject of much argument by the parties. In the setting and under the circumstances of this case, the Arbitrator has found it necessary to consider such things as availability of other employment in the same industry or any other industries, the age of the employee, his skills, recognizing that most were beer truck drivers or warehousemen for much of their lives, his physical condition for other work, whether he collected unemployment compensation, employment

conditions in the area, and the like. Many of the employees suffered no loss of earnings, some worked not at all, others worked for limited periods through May 31, 1977. There is no one factor that was controlling. The Arbitrator had to consider all the factors in evaluating each employee claiming damages.

The Arbitrator has found that most of the employees met their responsibility. Most were actively seeking employment for the entire period, making reasonable efforts in light of all the circumstances. The Arbitrator has found that some employees, to different degrees, were not making a reasonable effort and I have made a reasonable adjustment of their claims.

V. Unemployment Compensation:

Most of the employees who are to receive back pay collected unemployment compensation, many for the maximum allowed by law. Some collected for a lesser number of weeks and some did not collect any.

The Company seeks to deduct from back pay damage to an employee the amount he received in unemployment compensation. The Arbitrator cannot allow this.

In New Jersey an employee has a personal legal obligation to return to the Unemployment Compensation Division the unemployment compensation payments received for each week for which he receives back pay in this case. The primary responsibility to return the payments is that of the employee, and not the Company.

The Arbitrator is retaining jurisdiction in the Award, as requested by both parties, any dispute over the return of monies to that Division will be resolved and the mechanics for the return will be arranged. However, no set off against the back pay will be permitted.

VI. Company Pension Payments:

Pension payments paid to the employees by the Company's Pension Fund may not be offset against their back pay entitlements. However, for each month for which an employee receives substantial back pay in this case, he must return to the Company's Pension Fund the amount of the monthly pension payment he received from that Fund. The Company and the Pension Fund are entirely separate entities, and the assets of the Fund are for the benefit of the pensioners and eligible employees, including those involved in this case.

The parties agreed that I should retain jurisdiction to assure the proper return of pension payments to the Pension Fund. I am retaining jurisdiction to do this.

The Arbitrator does not agree with the Company that simply because an employee applied for and received a Pension from its Pension Plan, and/or Social Security old age pension, the employee should be disqualified from receiving back pay in this case. The Arbitrator would certainly expect that permanently laid off employees, fearful of their future, would seek every legitimate source of income they could obtain, including Company pensions and Social Security pensions. In my opinion, they do not thereby remove themselves from the job market. Whether they did or did not properly seek other employment to lessen their back pay damages is a separate matter.

VII. Pension Credits With Company Pension Fund:

The Arbitrator has difficulty accepting the Company's argument that the employees who were able to obtain other employment following their layoff to May 31, 1977 should not receive pension credits for the period of the other employment, but presumably should receive the credits when not employed. Obtaining other employment

in the back pay period does not reduce the number of weeks of back pay entitlement. The earnings from such other employment in the back pay period are set off against the Company's back pay liability for the period. Employees who obtained other employment cannot be penalized by a loss of valuable pension credits with the Pension Fund. It has been represented to me that some of the employees, upon receiving pension credits, will be entitled to pensions, others will be entitled to increased pensions, and others will derive no benefit at all from the additional pension credits.

The employees are entitled to pension credits for the entire back pay period from their layoff to May 31, 1977, on the same basis as if they had been employed by the Company during that period. It has been represented to me that pension crediting is based upon the number of days worked or for which an employee receives pay. Whichever may be the case, if an employee could not have worked due to illness or the like and would not be entitled to credits for days in such periods, he will not be receiving same under this Award.

Pension credits are necessary to make employees whole and to put them in the position they would have been in had they not been laid off by the Company in favor of independent distributors. They are routinely awarded in cases involving discharges or improper layoffs, and do not provide a "windfall" to the employee, even if the employee's other employment may have provided for pension crediting with the new Employer. Such crediting would be relatively little value to the employee, as the Union properly argues.

The parties have agreed that I should retain jurisdiction over any dispute involving the pension crediting, and the Arbitrator will be doing so.

VIII. Social Security Pensions:

A number of employees, unable to obtain substantial employment elsewhere following their layoffs, applied for and began receiving Social Security early retirement benefits as they reached their 62nd birthday between October, 1975 and May, 1977. As the Arbitrator has already stated, I do not agree with the Company's contention that by doing so they should be considered as having removed themselves from the job market and lost their entitlement to back pay.

The Company also contends, in the alternative, that the Social Security Pensions they received should be offset against the Company's back pay liability. The Union contends otherwise.

I have been deeply troubled in resolving this matter. The employees should be made reasonably whole as the proper remedy. They should not unreasonably profit from a back pay award or have to suffer losses from the award. Sometimes it is difficult to avoid one result or the other.

The Arbitrator has been cited no Social Security regulation to indicate whether that agency will or will not be entitled to a return of any monthly pension payments in the event that an employee receives a substantial back pay award covering the same months as the pension payments. Assuming that nothing has to be returned by the employee, I still have to consider such things as the basis for the pension payments, the withholding of Social Security contributions over the years from employee pay checks, the right of an employee to work while receiving pensions and the effect upon the pensions, etc.

It is obvious to the Arbitrator that many of the employees that began receiving early retirement pensions from Social Security in the back pay period were financially prejudiced and will continue to be in the future. Had they not been laid off in favor of independent distributors in violation of the Collective Bargaining Agreement, they would have had the opportunity to continue well-paying jobs as they came closer to the age of 65, and might well have had the choice and opportunity of applying for and receiving full Social Security pensions. Because of their layoff, most are now committed to lesser pensions for the rest of their lives. For these employees the damage will continue.

On balance, in my opinion, the Arbitrator does not feel that the Company can look to Social Security pensions as an offset against the back pay liability, at least not in this type of case and under the circumstances of this case.

IX. Interest:

The Arbitrator ruled on the last day of the hearing that interest should be awarded at 7½% per year (.625% per month) from June 1, 1977. I see no reason to change my mind.

The parties empowered the Arbitrator in the arbitration submission agreement to determine the proper remedy for the violation. Interest is not a penalty against the Company. Its function is to make employees reasonably whole, and that is the proper remedy. I am also mindful of the long time that has passed since the layoff of the employees.

The Arbitrator considers the rate of interest reasonable, and the June 1, 1977 date a fair one to begin the interest running. It is selected because it is the first day when all of the back pay and medical damages became fixed.

X. Retention of Jurisdiction and Escrow:

On the final day of hearing, April 18, 1978, the parties agreed that the monetary damages to be awarded should be paid to the Union's counsel and placed by him in an

escrow account for distribution. They further agreed that the Arbitrator should retain jurisdiction to resolve any disputes over the distribution and over certain other matters already discussed.

The parties also agreed that my Award should be considered as final and binding. The Award is being issued on this basis. I will retain jurisdiction only for the limited purposes noted in this Opinion.

XI. GENERAL OBSERVATIONS:

The Arbitrator has been fully aware of the desire of the Company to seek rulings which will reduce its substantial liability in this case. The back pay period is a considerable one and there are a large number of employees involved. However, that cannot justify my deviating from general principles followed in arbitration, and most of the issues raised here by the Company are involved in the simplest of discharge or alleged improper layoff cases which I have decided over my many years as an Arbitrator.

XII. AWARD:

1. As set forth in the April 21, 1976 Opinion and Award, the Company violated the Collective Bargaining Agreement.

2. The proper remedy is for the Company to pay damages for back pay losses and loss of medical-insurance coverage suffered by the employees through May 31, 1977, as set forth in the attachment. I fix these damages at $1,560,189.31 and direct that this sum be promptly paid to Counsel for the Union..

I further direct that the Company pay interest on that amount retroactive to June 1, 1977, at the rate of 7½% per year (.625% per month) and until payment of the

damages is actually made to counsel for the Union. The interest, through May 31, 1978 is $117,014.19.

In accordance with the agreement reached by the parties at the hearing, I direct that Counsel to the Union place the damages and interest in an escrow account and give at least five (5) days written notice to Counsel for the Company of all distributions from the account. Repayments to the Company's Pension Fund and to New Jersey Unemployment Compensation Division required of employees receiving back pay damages may be made directly from the escrow account. Counsel fees, if applicable, may be paid directly from the escrow account. Any disputes over distributions may be referred to me by either party for resolution.

3. All employees listed on the attachment, except those specifically excluded, shall be given full pension credits for the period from their layoff through May 31, 1977, on the same basis as they would have received had they not been laid off and were working at the Depot for the entire period. If such crediting is not given for periods of sickness or disability under the Pension Plan, the employees shall not be given credit for those periods. The Company shall promptly supply to the Union a list of the employees and additional pensions credits being supplied to them under this Award. Any dispute over the crediting may be referred to me by either party for resolution.

4. This Award is final and binding. The Arbitrator is retaining jurisdiction over the limited matters referred to in the Final Opinion and Award to resolve any disputes which may arise regarding those matters.

/s/ PAUL W. HARDY
Paul W. Hardy
Arbitrator

Dated: June 23, 1978

State of New Jersey }
County of Essex } :ss

On the 23rd day of June, 1879, before me personally came and appeared Paul W. Hardy, to me known and known to me to be the person described herein who executed the foregoing instrument, and he acknowledged to me that he executed the same.

/s/ HELEN R. LUDWIG
Helen R. Ludwig
Notary Public of New Jersey
My commission expires
October 13, 198-

ATTACHMENT.

Name	*Total Due ($)*	*Pension Credits Are Granted to Each So Listed*
A. DeTore	15475.37	
M. Ulrich	8389.75	
L. McGrath, Jr.	12201.28	
G. Spiotto	16187.81	
A. Andreyuk	3963.21	
F. DeJohn, Sr.	9665.45	
L. LaSalle	21669.16	
H. Neidel	20725.35	
R. Jones	15761.16	
H. Smith	19420.13	
F. Briskie	21386.93	
B. Jaworski	9849.25	
V. Alcamo	17955.25	
C. Ream	515.00	
H. Rees	7574.01	
C. Murden	15794.88	
J. Segari	19737.39	
H. Janowski	15100.02	
E. Falk	22578.91	
E. Brehme, Jr.	12414.35	
A. Lawler	18945.95	
S. Rudinski	16897.24	
S. Hrico	17783.70	
W. Ciszewski	4767.70	
G. Auer	13137.18	
W. Lyons	18115.13	
D. J. Dunn	10768.51	
J. Lubanski	18773.60	
S. Jaskot	4174.84	
N. DeVone	15298.41	

Name	*Total Due ($)*	*Pension Credits Are Granted to Each So Listed*
S. Fiederowicz	19007.25	
A. Harlin	13089.11	
M. Janowski	21422.01	
J. Maulbeck	19053.81	
V. Doyle	15771.74	
M. Martino	6725.92	
J. Cousins	10918.65	
A. Marra	00.00	
C. Baudistel	19588.92	
F. Krauter	17357.92	
L. Bennett, Jr.	3805.87	
H. Kucher	17072.71	
G. Mirkovich	17177.26	
J. Plaugic	15701.62	
P. Koslovski	8384.82	
J. Semple	18113.37	
E. Zalenski	12297.13	
I. Kalinowski	17833.12	
H. Benislawski	14535.03	
T. Caliendo	00.00	
V. Krzyosz	8929.60	
E. Cxypoliski	18642.88	
J. Watson	9373.00	
R. Marsano	13603.00	
F. Bucco	17793.52	
G. Curcio	16211.49	
E. Geldhauser	636.31	
O. Ressler	19184.16	
J. Lefand	21524.16	
J. McKenna	13280.89	
T. Ganley	15189.63	

Name	*Total Due ($)*	*Pension Credits Are Granted to Each So Listed*
J. Flammer	16272.84	
J. Owchark	16528.99	
W. Wisniewski	15601.74	
W. Karras	15647.00	
Z. Wisniefsky	21415.10	
C. Schanshek	24188.27	
L. Santorini	00.00	
G. Zarr	14752.51	
N. Tortoriello	6814.28	
H. Baumann	693.55	
G. Peck	661.20	
W. Barbusin	19581.69	
T. Janowski	10736.48	
W. Neff	21696.35	
P. Kordanish	18248.54	
M. Mazur	14151.40	
P. Galioto	6211.07	
J. Grosso	18323.92	
A. Treasone	13525.35	
J. Kopera	20092.32	
D. F. Dunn	15933.22	
J. Ammirata	13724.03	
A. Zych	14387.49	
J. Miller	9527.31	
P. Robertzaai	7226.48	
F. Zebro	15343.41	
N. Raimo	3782.20	
L. Sourifman	12584.27	
M. Sobel	11958.38	
J. Difilippo	10712.82	
G. Sobolewski	4606.74	

Name	*Total Due ($)*	*Pension Credits Are Granted to Each So Listed*
M. Petrone	14522.71	
F. Tunnero	14377.47	
J. Gesumaria	6821.59	
G. Gardner	19792.08	
M. Estenes	18473.32	
N. Freedman	18831.64	
P. Sukatskas	8565.60	
M. Curtin	6717.81	
J. Kalinowski	4530.42	
W. Carroll	13523.40	
J. Tully	13377.10	
A. Bironi	3653.42	
C. Gaska	1182.00	
A. Polito	21593.32	
W. Gerstenmeier	18305.76	
W. Saracino	554.04	
R. Parker	11129.44	
T. Petrosavate	18135.80	
H. Baranoff	13586.88	
G. Giarizzo	21200.05	
S. Moschella	12919.21	
P. Bencsko	19517.34	
E. Ritger	21131.67	
F. Kolberg, Jr.	70.00	
P. DeBenedetto	14736.29	
T. J. Bushman	00.00	
T. Dudek	00.00	
H. Wagner	660.18	
M. Agolia	00.00	
A. Sommer	00.00	
L. Digiovanni	00.00	

Name	*Total Due ($)*	*Pension Credits Are Granted to Each So Listed*
F. Parrillo	00.00	
S. Grzybowski	00.00	
A. Bene	00.00	
F. Warren	00.00	
O. Gauweiler	00.00	
G. Levin	00.00	
F. Ciba	00.00	
A. Jacobs	00.00	
R. Capadanno	00.00	
A. Adamschick	00.00	
J. O'Neill	00.00	
J. Redman	00.00	
R. Cignarello	00.00	
G. Pannick	00.00	
L. Rygiel	00.00	
C. Andriola	00.00	
S. Spano	00.00	
S. Krok	00.00	
A. Chrzanowski	00.00	
J. Manning	00.00	

No Damages and No Pension Credits

W. Allen
J. Domer
J. Austin
F. Gilde
E. Holler
E. Matusiak
A. Tauriello
D. Bishop
A. Kondratuk

APPENDIX F.

Final Judgment of the District Court.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 76-1383

FALSTAFF BREWING CORPORATION,
Plaintiff,

v.

LOCAL NO. 153, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
Defendant.

Civil Action No. 78-1483

LOCAL UNION NO. 153, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, an unincorporated labor union,
Plaintiff,

v.

FALSTAFF BREWING CORPORATION, a corporation of the State of Delaware and authorized to do business in the State of New Jersey,
Defendant.

Order and Final Judgment.

(Filed November 3, 1978)

This matter having been opened to the court on motion of Falstaff Brewing Corporation to reopen Civil Action No. 76-1383, to consolidate said action with Civil Action No. 78-1483, and for leave to file the amended complaint as annexed to its Notice of Motion, and further having been opened to the court on motion of Local No. 153 for final judgment confirming and specifically enforcing the arbitration award dated June 23, 1978 rendered in New Jersey State Board of Mediation Case No. 75-293 and dismissing Falstaff's amended complaint pursuant to Rule 56, and it appearing that Civil Action No. 76-1383 was administratively terminated by the court on September 17, 1976 without prejudice to the reopening of same upon completion of the arbitration case, and a final arbitration award has now been rendered, and Local Union No. 153 consenting to the motions of Falstaff to reopen Civil Action No. 76-1383, to consolidate same with Civil Action No. 78-1483, and to the filing of the amended complaint, and the court having examined all of the pleadings, including the amended complaint, the arbitrator's opinions and awards annexed to the verified complaint in Civil Action No. 78-1483, the collective bargaining agreement, the pertinent transcripts of the arbitration hearings and briefs filed therein with the arbitrator, the briefs and memoranda filed herein, including the National Labor Relations Board charges and decisions set forth therein, and having considered the oral argument of counsel, and the court having filed a written opinion on November 3, 1978 finding that Local Union No. 153 is entitled to final judgment confirming and enforcing the final arbitration award as a matter of law and dismissing Falstaff's amended complaint, and for other good and sufficient cause appearing.

IT IS on this 3d day of November 1978 *ORDERED* that the motions of Falstaff Brewing Corporation to reopen Civil Action No. 76-1383, to consolidate said action with Civil Action No. 78-1483, and for leave to file the proposed amended complaint be and hereby are granted. For the purposes hereof, said amended complaint shall be deemed as filed this date; and

IT IS FURTHER ORDERED that final judgment be and hereby is granted, pursuant to Rule 56, in favor of Local Union No. 153, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and against Falstaff Brewing Corporation dismissing the amended complaint in Civil Action No. 76-1383; and

IT IS FURTHER ORDERED that final judgment be and hereby is granted, pursuant to Rule 56, in favor of Local Union No. 153, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and against Falstaff Brewing Corporation in Civil Action No. 78-1483 confirming and specifically enforcing the final arbitration award in New Jersey State Board of Mediation Case No. 75-293 and, in connection therewith, final judgment be and hereby is entered in favor of said Local Union No. 153 and against Falstaff Brewing Corporation in the sum of $1,727,258.18 (inclusive of interest to the date of entry hereof) and, pursuant to the provisions of said award, the same shall be paid to counsel to Local Union No. 153, namely Schneider, Cohen & Solomon, Esqs., to be placed in an escrow account for distribution in the manner provided for in said award, and Falstaff Brewing Corporation is hereby ordered and directed to comply forthwith with all other terms and conditions set forth in said award; and

IT IS FURTHER ORDERED that costs be taxed against Falstaff Brewing Corporation.

/s/ H. CURTIS MEANOR
H. Curtis Meanor
U. S. D. J.

APPENDIX G.

Act of June 23, 1947, 61 Stat. 153, 29 U. S. C. § 173 provides:

§ 173. FUNCTIONS OF SERVICE

Settlement of disputes through conciliation and mediation

(a) It shall be the duty of the Service, in order to prevent or minimize interruptions of the free flow of commerce growing out of labor disputes, to assist parties to labor disputes in industries affecting commerce to settle such disputes through conciliation and mediation.

Intervention on motion of Service or request of parties; avoidance of mediation of minor disputes

(b) The Service may proffer its services in any labor dispute in any industry affecting commerce, either upon its own motion or upon the request of one or more of the parties to the dispute, whenever in its judgment such dispute threatens to cause a substantial interruption of commerce. The Director and the Service are directed to avoid attempting to mediate disputes which would have only a minor effect on interstate commerce if State or other conciliation services are available to the parties. Whenever the Service does proffer its services in any dispute, it shall be the duty of the Service promptly to put itself in communication with the parties and to use its best efforts, by mediation and conciliation, to bring them to agreement.

Settlement of disputes by other means upon failure of conciliation

(c) If the Director is not able to bring the parties to agreement by conciliation within a reasonable time, he shall seek to induce the parties voluntarily to seek other means of settling the dispute without resort to strike, lock-out, or other coercion, including submission to the employees in the bargaining unit of the employer's last offer of settlement for approval or rejection in a secret ballot. The failure or refusal of either party to agree to any procedure suggested by the Director shall not be deemed a violation of any duty or obligation imposed by this chapter.

Use of conciliation and mediation services as last resort

(d) Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases.

Act of July 30, 1947, 61 Stat. 672, 9 U. S. C. § 10 provides:

§ 10. SAME; VACATION; GROUNDS; REHEARING

In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

Supreme Court, U. S.
FILED
JAN 16 1980
MICHAEL RODAK, JR., CLERK

79-976

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

[redacted]

LOCAL NO. 153, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Respondent,

vs.

FALSTAFF BREWING CORPORATION,

Petitioner.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1220

LOCAL NO. 153, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Respondent,

vs.

FALSTAFF BREWING CORPORATION,

Petitioner.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW AND JURISDICTION

Respondent concurs in petitioner's statement of the opinions below and does not question the jurisdiction of this Court.

QUESTIONS PRESENTED

The petitioner's statement of Questions Presented for Review is misleading and inaccurate because, as will be discussed *infra*, it is based upon facts and conclusions which are erroneous and not supported by the arbitrator's award or the opinions below. The actual facts and conclusions below do not give rise to the questions presented.

STATUTES INVOLVED

The singular statute directly involved is Section 301 of the Labor Management Relations Act, 29 U.S.C.A. Section 185, which petitioner does not refer to in its statement of Statutes Involved. Petitioner set forth no contentions in the Court below that the statutes it refers to were directly involved in this matter, nor any dispute over the meaning of said statutes.

COUNTER-STATEMENT OF THE FACTS AND THE CASE

This matter involves reciprocal actions under Section 301 of the Labor Management Relations Act, 29 U.S.C.A. Section 185, one by Local Union No. 153, a/w International Brotherhood of Teamsters (hereinafter "Local 153" or "the Local") for confirmation and enforcement of an arbitration award rendered by a designated arbitrator of the New Jersey State Board of Mediation, which the parties had previously agreed would be binding and conclusive upon them, and the other by petitioner Falstaff Brewing Corporation (hereinafter "Falstaff" or "the Company") for vacation of the same award. The actions were

consolidated in the District Court. The District Court, under Rule 56, upon motion of Local 153, granted summary judgment confirming and enforcing the award and dismissing the action for the vacation of the award. (Petition, Appendix D.) The material facts were not, nor could they be, in dispute in the District Court. Submitted to that Court was the entire pertinent record of the arbitration case, including the collective bargaining agreement, the arbitration submission agreement, the transcripts of the pertinent arbitration hearings along with the relevant exhibits thereto, the voluminous briefs that both parties had submitted to the arbitrator during the course of the arbitration case, the arbitrator's two interim and his final award, decisions rendered by the National Labor Relations Board involving the parties relating to the ongoing arbitration case, and other exhibits pertinent to all of the foregoing.

Although arbitration is supposed to be an inexpensive and expeditious vehicle for the resolution of grievances, the instant arbitration case, commenced in October of 1975, took some 32 months to be completed, including the bifurcation of issues, testimony by some 120 witnesses, and extensive discovery. The arbitrator's final award was rendered on June 23, 1978. (Petition, Appendix E.) The order and final judgment of the District Court was filed on November 3, 1978. (Petition, Appendix F), and the Court of Appeals entered a judgment order on October 22, 1979 affirming "essentially for the reasons set forth in the opinion of the district court filed November 3, 1978." (Petition, Appendix C.) The petition for rehearing in banc was denied on November 19, 1979. (Petition, Appendix B.)

In its petition herein for the Writ of Certiorari to the Third Circuit, Falstaff omits and distorts salient facts and

mischaracterizes and emasculates the arbitrator's awards and the opinion rendered by the District Court, as well as the "view" of the Third Circuit. A counter-statement of the facts is necessary, and will be heavily condensed to the points raised in the petition. The petition was prepared in disregard of the applicable principle of review that the evidence is to be viewed and construed favorably to the prevailing party below.

Until April, 1972 P. Ballantine & Sons, a well-known regional brewer trading under the "Ballantine" label, operated a brewery and distribution depot at its Newark, New Jersey premises. For its distribution operation, it employed drivers, helpers and warehousemen at the depot to service its 15,000 to 17,000 customers in the New Jersey-New York City metropolitan area. These employees were represented for the purposes of collective bargaining by Local 153 and a sister local. In April, 1972 the Ballantine brewery and the depot were closed and its label, its delivery trucks, its customer lists and records, and other related assets were purchased by Falstaff. Falstaff took over the employment of more than 140 of the distribution employees, and commenced to manufacture the Ballantine-labeled beer and ale products in its own breweries. For a short time, it continued to utilize the former Ballantine distribution depot for the warehousing and distribution of the products to the former Ballantine customers and then moved the entire distribution operation and the employees and trucks to a new distribution depot it acquired in North Bergen, New Jersey.

Following a series of extensions of Ballantine's former collective bargaining agreements, which Falstaff had assumed, Falstaff and Local 153, which had been awarded jurisdiction over the entire new depot, commenced negotiations for a new collective bargaining agreement to be effective June 1, 1973. The employees, by and large, had been long-service distribution employees with Ballantine with relatively advanced age.[1] In order to provide these employees with reasonable job security with their new employer, Local 153 sought and obtained in the give and take of the negotiations specific agreements from the Company to continue the distribution operation with these bargaining unit employees and precluding the Company from discontinuing its use of its employees and trucks in favor of warehousing and distributing to the customers through independent distributors, their employees and trucks. Falstaff agreed that the bargaining unit work of the employees —the very work that these employees had performed for decades for Ballantine and then Falstaff, the warehousing and distribution of the products to the 15,000 to 17,000 customers in the New Jersey-New York City metropolitan area then and theretofore being serviced from the depot —would continue to be serviced by the bargaining unit employees and would not be given away to independent distributors. These agreements were incorporated into Article XVI of the new collective bargaining agreement at page 30 (Petition, A11-A12), and the meaning and effect of the provisions were central to the arbitration case which ensued. The arbitrator found, after hearing all of the pertinent testimony and examining all of the pertinent exhibits, that the parties had agreed that, and the provisions meant that, the Company was precluded from converting to distribution to the same customers through independent distributors.

1. Sadly, but literally, various of the employees have died in the years that have elapsed since the commencement of the arbitration case in 1975 waiting for its conclusion.

During the same give and take of negotiations for the collective bargaining agreement, the Company sought and obtained a very peculiar termination provision, one which required that the collective bargaining agreement be automatically extended from May 31, 1967, for periods of one year, from year to year, unless a party seeking changes in the agreement not only served written notice of a desire to modify same within 60 days of its expiration date, but also served specific written modification proposals within 30 days of the expiration. The peculiar provision was incorporated into the new agreement as Article XXII. (Petition, A27.) The arbitrator found Article XXII to be clear in this regard.

The new collective bargaining agreement also contained a broad scope grievance provision terminating in arbitration through the New Jersey State Board of Mediation. Said provision made grievable and then arbitrable

> "any difference between the Depot and the employees covered by this Agreement or between the Depot and the Union as to: (a) any matter relating to wages, hours of work or working conditions covered by this Agreement, and (b) any matter involving the interpretation, application or claimed violation of this Agreement. Both the Depot and the Union and the employees must resort to the use of the established grievance procedure as hereinafter provided."

Following the execution of the new agreement and until early October, 1975 Falstaff continued to distribute through the depot with the bargaining unit employees and trucks. However, in early October, 1975 it began a gradual layoff of the bargaining unit employees, selling the trucks to independent distributors, and commenced using those

independent distributors to distribute to the same customers. Within a short period of time, the Local discovered the conversion to the independent distributors and immediately grieved. The Company decided to continue the conversion in the face of the proceedings. As was ultimately reflected in the arbitration case, all of the Company's representatives that had participated in and had been familiar with the contract negotiations had been terminated in the years subsequent to the execution of the agreement by new managerial officials of the Company; the new managerial officials had decided to convert to distribution through independent distributors, as was noted by the arbitrator, without any significant reference to the terms of the collective bargaining agreement with Local 153.[2]

Upon the filing of the grievance, both parties, through counsel, agreed to waive all of the preliminary steps of the grievance procedure in order to expedite arbitration of the dispute. An arbitrator was designated by the New Jersey State Board of Mediation on November 5, 1975 and the first arbitration hearing took place on February 27, 1976. At the outset of the hearing the parties jointly agreed upon and entered into an arbitration submission agreement stating:

---

2. The distribution by the independent distributors, one in New Jersey and the other in New York, was accomplished using the Ballantine-logoed trucks received by them from Falstaff. The Company had worked out credit and price arrangements with the distributors, turned over to them the sales records constituting the customer list of the depot along with its advertising materials, and various of the depot's salesmen and its manager transferred to the distributors. Subsequently, after the bulk of the bargaining unit employees had been laid off, the Company instituted mass-media advertising in the New Jersey-New York metropolitan area of the customers to promote the sale of the Ballantine-labeled products through the independent distributors.

"We, the undersigned, hereby agree to submit the following controversy to arbitration: (No. persons involved 140)

"Has the Company violated the applicable provisions of the collective bargaining agreement set forth on page 30 of the collective bargaining agreement? If so, what shall be the remedy?

* * * *

"We further agree that we will faithfully abide by and perform any award made pursuant to this agreement and that such award shall be binding and conclusive upon us."

The issue agreed upon for the arbitrator's resolution was not narrowly drawn or limited to "subcontracting", the word utilized by the Company throughout its petition herein, but was the broader, all-encompassing issue of whether the Company violated the provisions on page 30 of the labor agreement, and the appropriate remedy. The arbitrator found that the Company's conversion to independent distributors violated the said provisions.

During the course of the initial hearing on liability, the Company's principal witness conceded that there were only two modes of distributing the Ballantine-labeled products to the customers theretofore being serviced from the depot: (1) by continuing to distribute through its own depot with its own unit employees and trucks (as it had been doing and as Ballantine had done for decades before), or (2) by distributing through independent distributors, using their employees, trucks and facilities (*i.e.*, selling the product to the distributors to sell to those customers). The Company also presented testimony that the depot was not to be considered as closing down despite the

ongoing and heavy layoff of bargaining unit employees and utilization of independent distributors in their place; that the depot's operations might later be expanded again. The testimony of the Company was frought with issues of credibility for the arbitrator to resolve. The Company basically argued that the provisions on page 30 did not preclude it from distributing through independent distributors because it made no formal, exclusive agreement with the distributors and had not "intended" to convert to that mode of distribution. The Local argued that the Company did so convert and that such was precluded by the provisions for the 15,000 to 17,000 customers theretofore serviced from the depot by the unit employees and trucks. The arbitrator ultimately agreed with the Local in an interim award on the liability phase of the case rendered on April 21, 1976.

Then began the remedy phase of the case. Among the many disputes over damages which arose in this phase of the case was one involving the length of time for which damages should run to the employees. A determination by the arbitrator appeared to be necessary in order for the parties to calculate damages and offsets for the individual employees. With the depot's operation down to a relative minimum, the Local had served a sixty-day notice seeking to change the agreement effective June 1, 1976, its stated expiration date. The Company sent no sixty-day notice of any desire to either terminate or modify the agreement. The Local decided to forego its notice and did not send any thirty-day written modification proposals to the Company, advising the Company that it was allowing the agreement to automatically extend for an additional year without modification as provided for in Article XXII. The dispute over the meaning of Article XXII surfaced at an August 23, 1976 hearing before the arbi-

trator, the Company claiming that back pay should not be awarded beyond May 31, 1976 and the Local contending that the agreement had automatically extended to May 31, 1977. In order to resolve the dispute, the parties joined in an express stipulation to the arbitrator that the merits of the dispute be resolved by him. The stipulation, presented by the Company's counsel Mr. Kahn, at the hearing, was as follows:

> "Mr. Kahn: I think Ed /Cohen, the attorney for the Union/ and I both have certain stipulations which we can present to you on matters which we need some guidance on in terms of a preliminary award on the damages so that we can, therefore, proceed and calculate what would be due. I think the first question is whether the Collective Bargaining Agreement terminated on May 31, 1976 or whether it still continues in full force and effect." (Petition, A28.)

The parties then continued with the stipulations on other types of issues involving damages and offsets being presented to the arbitrator for a preliminary decision, outlining their respective position on and arbitrating the merits of each. In its posthearing brief, to the arbitrator, the Company specifically noted to the arbitrator that his determination of the contract extension issue was "vital" under "any theory of recovery." Neither party made any claim that the merits of this or any other issue presented were not arbitrable or were beyond the jurisdiction of the arbitrator and, perforce, neither party asked the arbitrator to decide if he had jurisdiction to resolve any of the issues. Such would have been untenable in light of the joint stipulation that the arbitrator resolve the merits of the contract extension issue and the other stipulated issues in

the context of determining the period for which damages were to run to the employees. The arguments of both parties on the contract extension issue, like the other issues, were strictly confined to the merits of same. The Company argued that, under Article XXII, service of a sixty-day notice by either party was all that was necessary in order to prevent the agreement from automatically extending for an additional year, and that service of thirty-day written modification proposals by the party seeking modification was not necessary. The Local argued that under Article XXII service of the thirty-day proposals was required, and that the contract automatically, by its own terms, extended for the additional year in the absence of such proposals. Both parties also advanced other arguments on the merits of the issue, agreeing that the language of Article XXII was unusual and that the arbitrator would have to interpret same and resolve the matter. The arbitrator found that the language plainly required the service of the thirty-day written modification proposals and that the Local had a right to forego the sending of same in order to allow the contract to extend itself to May 31, 1977. (Petition, A39-A41.)

Rather than select either a longer or a shorter period as reasonable for the running of back pay in the circumstances of the case, the arbitrator, apparently due to the positions of the parties, determined that the back pay should terminate upon the termination of the automatic one year extension of the agreement, May 31, 1977.[3]

Guided by the arbitrator's interim award on liability, the parties proceeded with discovery on individual dam-

3. The Company sent written notice of its desire to terminate the agreement effective May 31, 1977 during the course of the arbitration case, and the agreement was deemed to have expired on that date.

ages and the calculations regarding same, and this led to extensive hearings before the arbitrator on the actual damages and offsets for each employee. The arbitrator's final award, which makes final disposition of the contract interpretation issues, and damage and offset issues, as noted above, was rendered on June 23, 1978. (Petition, Appendix E.)

The facts set forth above are reflected in the exhibits submitted to the District Court, including the arbitrator's awards, and in the findings and conclusions set forth in the District Court's opinion. The petitioner's characterizations of the "views" of the District Court and the Court of Appeals in connection with the scope of review given an arbitration award—and given to this arbitrator's final award—are grossly inaccurate. The District Court's opinion, and the affirmance "essentially for the reasons set forth in" that opinion, speak for themselves, and do not say what the petitioner asserts. This will be more fully discussed *infra*.

ARGUMENT

As its four reasons for seeking the grant of the writ, petitioner argues (I) that the "views of" the Courts below on the proper scope of judicial review over the merits of the arbitrator's award were "wrong", and (II) that the merits of the contract extension issue should have been given *de novo* review for same were purportedly "jurisdictional". Petitioner then argues (III) that the arbitrator's finding that the agreement had been extended under Article XXII to May 31, 1977, and (IV) that the arbitrator's finding that Falstaff had violated the provisions on page 30 of the collective bargaining agreement, were wrong—characterized by petitioner as "arbitrary and capricious". Although petitioner does not assert that the arbitrator's finding that it had violated the provisions on page 30 were "jurisdictional", it reargues the merits of the issue *de novo* (as it also does in connection with the contract extension issue).

As a preface to its stated reasons for seeking the grant of the writ, petitioner states:

> "We submit that the courts below recognized that the Arbitrator's two crucial determinations were clearly erroneous, but believed that this Court's decisions made such determinations immune from judicial review on the merits." (Petition, p. 7.)

The statement is simply not true and petitioner, given the utmost proper license, cannot honestly so contend. Indeed, on the issue of liability—whether the Company had violated the provisions on page 30 of the collective bargaining agreement in converting to independent distributors—the District Court found that

"The facts here indicate that Falstaff had contractually agreed that the unit employees would continue, for the duration of the CBA, to distribute the beer to Falstaff's 15,000-17,000 retail customers of the Depot, and that Falstaff would use its own trucks for that purpose, as distinguished from having independent distributors do so, using their employees and trucks. This is what Falstaff promised the employees in agreeing to the work preservation provisions on page 30 of the CBA. The arbitrator found in his awards that this promise was breached when Falstaff began distributing its products to those same retail customers of the Depot through independent distributors. Falstaff had agreed with the Union and the employees that, if it was going to distribute Ballantine beer at all to those retail customers, its own employees would do so and they need not fear losing their jobs by a company conversion to independent distributors." (Petition, A31.)

On the issue of contract extension, the Court observed that

> "In light of the arbitrator's analysis of the facts presented to him, this Court concludes that it is logically possible to interpret Article XXII the way the arbitrator did. My subjective opinion as to the proper construction or application of the clause is of no moment here. *General Teamsters, Chauffeurs and Helpers, Local Union No. 249 v. Potter-McCune Company,* 412 F. Supp. 8, 11 (W.D. Pa. 1976). Certainly the arbitrator had grounds upon which to base his interpretation. *Cf. H.K. Porter Co., Inc. v. United Saw, File and Steel Products Workers of America,* 333 F.2d 596, 602 (3rd Cir. 1964). Whether such an interpretation is the best interpretation is not a matter for this court. *United Steelworkers of America v. Enterprise Wheel and Car Corp.,* 363 U.S. 593, at 599." (Petition, A29.)

Obviously, on neither of the two arbitrated issues did the Court find that the arbitrator's award was "clearly erroneous". The opinion reflects the contrary.

Nor did the District Court deem that this Court's decisions made arbitrator's awards "immune from judicial review on the merits." From the very face of the opinion, it is clear that the District Court carefully reviewed the merits of the award under the standard required by *Enterprise Wheel and Car Corp., supra,* and *Ludwig Honold Mfg. Co. v. Fletcher,* 405 F.2d 1123, 1126 (3rd Cir. 1969) —namely, to determine if the award "drew its essense from the collective bargaining agreement" as distinguished from the arbitrator "dispens/ing/ his own brand of industrial justice." The District Court discusses and states that it was reviewing the award in that context and it is crystal clear from the opinion that the Court did carefully review the award in that context. (Petition, A15-A21, A29-A30.) This Court has reaffirmed the narrow scope of judicial review on the merits of awards on arbitrable issues in repeated cases since *Enterprise Wheel and Car Corp.,* directly or by clear implication. See *Gateway Coal Co. v. Mine Workers,* 414 U.S. 368, 377-380, 94 S. Ct. 629, 38 L.Ed.2d 583 (1974); *Hines v. Anchor Motor Freight, Inc.,* 424 U.S. 554, 562-563, 96 S. Ct. 1048, 47 L.Ed.2d 231 (1976); *Buffalo Forge Co. v. Steelworkers,* 428 U.S. 397, 405, 96 S. Ct. 3141, 49 L.Ed.2d 1022 (1976); *Nolde Bros. v. Bakery Workers,* 430 U.S. 243, 252-255, 97 S. Ct. 1067, 51 L.Ed.2d 300 (1977), *reh. den.* 430 U.S. 988, 97 S. Ct. 1689 (1977).

Petitioner professes to be in full agreement with the narrow scope of review required, the "essence" test (Petition, p. 9); *it does not quarrel with the statements of law set forth in the District Court opinion. It merely—and irrationally in the face of the opinion—claims that the test was not applied to the award in this case.* Because the District Court expressly refused to agree with petitioner and found that the award drew its essence from the agreement, and the Court of Appeals affirmed, petitioner brazenly charges that both Courts found that the award was "judicially non-reviewable" and exercised "no function" of judicial review of the merits. (Reason I, Petition, pp. 6, 8.) The opinion of the District Court reflects careful review of the merits under the "essense" test. The District Court did not review the merits *de novo,* and that it was not supposed to do under the "essense" test.

As its second reason for seeking the grant of the writ, petitioner asserts that the issue of contract extension was "jurisdictional" and, in essense, subject to *de novo* judicial review. It states that "a finding by an arbitrator that he has jurisdiction to decide a dispute is subject to broad and rigorous judicial review" (Petition, p. 10), and that an arbitrator's "jurisdictional determination" has been held by this Court and various Courts of Appeal, including the Court of Appeals below, to be subject to full judicial review. With this statement of the law respondent has no quarrel and neither did the Courts below. However, the statement of the law and the cited cases are inapposite in the facts of this case. The arbitrator here made no "finding" that he had jurisdiction. He made no "jurisdictional determination". He did not have to. He was not asked to do so. As the opinion below found (Petition, A28-A29),

> "* * * The record demonstrates that the merits of the issue of contract termination or extension was, *by express stipulation* of both Falstaff and the Union, submitted to the arbitrator for decision without reservation or qualification. Additionally, the record indicates that Falstaff (along with the Union) strongly urged the arbitrator to decide the merits in his arbitration award of the issue because such a decision was vital to damage calculations that would have to be made.
>
> "* * * The issue of arbitrability was never posed at all. Even on the final day of hearing, April 18, 1978, when Falstaff moved to reargue to the arbitrator his prior rulings on several issues, including the CBA termination issue, there was no claim of lack of jurisdiction or want of arbitrability. Accordingly, Falstaff's argument to this court that the termination issue was not arbitrable must fail. Both parties clearly submitted the issue to the arbitrator." (Emphasis in original.)

Falstaff had stipulated to the arbitrator's "jurisdiction" and authority to hear and decide the merits of the issue by stipulating that the arbitrator was to decide the merits of the issue, raising no contention that the arbitrator lacked "jurisdiction" or authority. Assuming *arguendo* that the arbitrator did not otherwise have the "jurisdiction" or authority to determine the merits of the issue, the stipulation conferred same upon him. The District Court nevertheless reviewed the award on the issue to determine if it drew its essense from the collective bargaining agreement. (Petition, A29.)

Even putting aside the stipulation itself, however, the overriding arbitrable controversy over the length of time

that damages should run to the employees in the circumstances of the case—which here subsumed the dispute over the meaning and effect of Article XXII—was plainly not a "jurisdictional" one. As stated in *International Union v. ITT, Thermotech Division*, 508 F.2d 1309, 1314 (8th Cir. 1975), cited by petitioner, while the issue of contract extension is normally for the court, the exception is "where the parties have agreed to arbitrate issues of contract termination or expiration." The instant collective bargaining agreement made arbitrable "any difference between the" parties as to "any matter involving the interpretation, application or claimed violation of this Agreement", and stated that the parties "must resort to the use of the established grievance procedure", which terminated in arbitration, to resolve such differences. The dispute over the meaning of Article XXII here—the contract extension issue—was in and of itself arbitrable. *Enterprise Wheel and Car Corp., supra; United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582, 80 S. Ct. 1347, 4 L.Ed.2d 1409 (1960); *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564, 567-568, 80 S. Ct. 1343, 4 L.Ed.2d 1403 (1960). Moreover, the parties, in their arbitration submission agreement, which expressly empowered the arbitrator to determine the appropriate remedy for the contract violation, made the issue arbitrable. The parties had agreed to, and did, arbitrate all of the issues regarding damages, including the period that damages were to run to the employees. The contract extension issue was merely a part thereof. The issue was not "jurisdictional". It was simply one of the many arbitrable issues submitted for resolution to the arbitrator in the context of the ongoing arbitration hearings on damages. The cases cited by petitioner as being in conflict are not in conflict with this case. They are in-

apposite to this case. The Courts below never had to reach petitioner's "jurisdictional" argument because, as the opinion below concluded, the parties had stipulated the merits of the contract extension issue to the arbitrator for his resolution of same. As noted, the arbitrator's award on the issue was found to draw its essense from the collective bargaining agreement.

For its last two reasons for seeking the writ (III and IV), petitioner reargues *de novo* the merits of the arbitrator's determination that the Company violated the provisions on page 30 of the collective bargaining agreement in converting to independent distributors and that the collective bargaining agreement, pursuant to Article XXII, was automatically extended to May 31, 1977, the arbitrator selecting that date as reasonable for the termination of back pay liability to the employees. The opinion below reviews the merits of the arbitrator's determinations, finding them to be grounded in the language and agreement of the parties, and meeting the "essense" test. While professing to be in agreement with the "essense" test as appropriate for judicial review over the merits of an arbitrator's award on an arbitrable issue, petitioner ignores the test to reargue the merits *de novo*.

The discussion in the opinion below as to the merits of the arbitrator's determinations on both issues have been set forth *supra* and need not be repeated. There is one point in connection with the petitioner's reference to the contract extension issue which requires comment. The petitioner inaccurately asserts that "the decision of the courts below that the agreement was renewed for another year is in conflict with" the same Third Circuit's decision in a leading case followed by other Circuits, *Paterson Parchment Paper Co. v. International Brotherhood of Paper Makers*, 191 F.2d 252 (3rd Cir. 1951),

cert. den. 342 U.S. 933, 72 S. Ct. 376, 96 L.Ed. 694 (1952), *reh. den.* 342 U.S. 956, 72 S. Ct. 625, 96 L.Ed 710 (1952). Of course, *the Courts below* did not decide that the agreement was extended pursuant to Article XXII. That decision was made by *the arbitrator* from the language of Article XXII and the facts of the case. The Courts below reviewed the award under the "essense" test. The Courts below did not find *Paterson Parchment* to be applicable, although cited by petitioner to the Courts below, because the parties had empowered the arbitrator to resolve the controversy over the meaning and effect of Article XXII. And the view of the Courts below in that regard is correct. In *Enterprise Wheel and Car Corp., supra,* 363 U.S. at 598-599, 80 S. Ct. 1358, 4 L.Ed.2d 1424 (1960), this Court cautioned that arbitration awards on contract interpretation are not to be given plenary review to determine if the arbitrator was "applying correct principles of law to the interpretation of the collective bargaining agreement" to determine the merits of the dispute; that such "would make meaningless the provisions that the arbitrator's decision is final, for in reality it would never be final."

In so stating, however, we do not wish to leave the impression that we are in agreement that the arbitrator did not apply correct principles of law. While such an issue is not proper for a reviewing court, and the Courts below so concluded (Petition, A20-A21), the fact of the matter here is that the arbitrator was perfectly correct in his determination of the issue under the unusual language of Article XXII. The matter is discussed by the arbitrator at length in his award. (Petition, A39-A41.) With but one exception, every single case cited by petitioner in the Courts below or herein dealt with contract termination provisions that required only the giving of a 60-day notice, and did not make the contract continue

upon the failure of a party giving notice seeking to amend same to serve contract proposals on the other within a stated period of time, here 30 days. Section 8(d)(1) of the National Labor Relations Act, 29 U.S.C.A. Section 158(d)(1) requires only the giving of a 60-day notice of termination or modification prior to the stated expiration date, but does not require that the agreement continue on for a year, from year to year, as does the instant contract language. Section 8(d)(4) of that Act, 29 U.S.C.A. Section 158(d)(4), provides that the agreement should only continue on until the 60-day notice is served and the 60 days elapse. The year-to-year extension required by the instant agreement in Article XXII is solely a creature of the contract, not of Section 8(d). Moreover, Section 8(d) does not require that a party submit written contract proposals to the other to modify a contract, much less contain any time requirement for any such written proposals. Section 8(d)(2) of the Act, 29 U.S.C.A. Section 158(d)(2), only requires that the parties negotiate over modifications. The requirement of Article XXII that written modification proposals be submitted, and be submitted by 30 days prior to expiration (lest the agreement automatically continue in effect for another full year) is solely a creature of the contract, not of Section 8(d).[4] The Company had sought the unusual language for reasons of its own in the contract negotiations, but the effect of the language crosses sides of the negotiating table. Under the provisions of Section 8(d), a 60-day notice by a party seeking to renegotiate the agreement or terminate same effectively binds both parties to the termination of the

4. Although rearguing the merits *de novo* of the arbitrator's decision of the issue, petitioner does *not* assert that Section 8(d) of the National Labor Relations Act, is even one of the "Statutes Involved" in its petition. See Petition, p. 4.

agreement at its stated date of termination, in the absence of a successor agreement. The cases cited by petitioner so hold. But under the provisions of Article XXII of the agreement, it cannot do so, for that provision, as the arbitrator found, requires the party seeking to renegotiate the agreement, who serves a 60-day notice for same, to also serve the 30-day written proposals, and, in the absense of the proposals, requires that the contract automatically continue from year-to-year until properly terminated. It precludes one party from relying upon the 60-day notice served by the other party who seeks renegotiations. The Company was contending that the language of Article XXII "tracks" Section 8(d) and that the cases construing that Section should be followed by the arbitrator; it was ignoring the actual contract language, and the meaning of that language, which it had negotiated into Article XXII.

The singular exception is *East Bay Union of Machinists v. Fibreboard Paper Products Corp.*, 285 F. Supp. 282 (N. D. Calif., 1968), *aff'd* 435 F.2d 556 (9th Cir. 1970). However, while there was similar contract language regarding the submission of written proposals in that case, the union therein had timely served the 60-day notice seeking to modify the agreement, and had *also* "submitted its proposed modifications to Fibreboard on June 15, 1969, within the required time provided by" the agreement. (285 F. Supp., at 284.) The union nevertheless contended the agreement had not expired. The Court found that it had expired. It never had to reach, and did not discuss, the issue presented by the parties to the arbitrator in the instant case of the effect of such contract language in the absense or abandonment of timely modification proposals, the contract here requiring the automatic one year extension.

The arbitrator's decision on the merits is quite correct under the actual requirements of Article XXII. While the Courts below refrained from deciding the merits *de novo,* they found that the arbitrator "had grounds upon which to base his interpretation" of Article XXII, that his decision was logical, and that it was binding upon Falstaff; basically, that it drew its "essense" from the agreement.

Finally, Falstaff takes the same approach in rearguing the merits of the arbitrator's finding that it had wrongfully converted to independent distributors in violation of the provisions on page 30. It grossly misstates the arbitrator's finding as to the meaning of those provisions and the promises it had made, refers to the finding as if they were *de novo* findings of the Courts below, and argues that same "conflicts" with other Circuit court decisions. The decisions it cites, however, are wholly alien and inapplicable *even to the merits* of the arbitrator's decision.

CONCLUSION

Petitioner sets forth no special or important reasons for the granting of the writ. Petitioner merely mischaracterizes the findings and conclusions of the arbitrator and of the Courts below. The Court of Appeals decided no federal question in a manner conflicting with the decisions of this Court or of any other Court of Appeals. To the contrary, the arbitration award was completely reviewed under the scope of review determined as proper by this Court. The Petition should be denied.

Respectfully submitted,

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1979.

No. 79-976.

FALSTAFF BREWING CORPORATION,
Petitioner,

v.

LOCAL NO. 153, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

REPLY BRIEF IN SUPPORT OF CERTIORARI.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979.

No. 79-1220.

FALSTAFF BREWING CORPORATION,
Petitioner,

v.

LOCAL NO. 153, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

REPLY BRIEF IN SUPPORT OF CERTIORARI.

The instant case raises the question of the proper relationship between the labor contract and external law; between labor arbitration and the judicial system; between private and public fori for dispute settlement. One of the important aspects of that relationship is the proper scope of post-arbitral review. In *Enterprise Wheel,*[1] this Court addressed the issue, but—as has often been pointed out—the issue was not settled. As a result, the Circuits have evolved differing and conflicting readings of *Enterprise Wheel.* It is now the time, we respectfully submit, for this Court to speak definitively to the issue of the scope of judicial review of arbitral awards.

1. *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U. S. 593, 80 S. Ct. 1358, 4 L. Ed. 2d 1424 (1960).

I.

Since 1960, when *Enterprise Wheel* was decided, lower courts and commentators [2] have differed as to interpretation of *Enterprise Wheel* regarding the scope of judicial review of arbitral decisions. Such differences have been more than justified because *Enterprise Wheel* is ambiguous: it is not clear whether the labor contract or external law is paramount; and *Enterprise Wheel* did not assign finality to any particular issue when decided by the arbitrator.

In *Enterprise Wheel*,[3] this Court, referring to the arbitrator's interpretation of the labor agreement, said "the courts have no business overruling him because their interpretation of the contract is different from his". At the same time, this Court said that "an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice * * * his award is legitimate only so long as it draws its essence" from the labor agreement. This Court concluded that: "When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award." 363 U. S. at 597.

Enterprise Wheel is thus far from plain in its definition of the relationship between the labor agreement and external law—between finality of the arbitral award and the

2. Among recent articles are: R. I. Bloch, *Labor Arbitration's Crossroads Revisited: The Role of the Arbitrator and the Response of the Courts*, 47 U. of Cinn. L. Rev. 363 (1978); T. J. St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at* Enterprise Wheel *and its Progeny*, 75 Mich. L. Rev. 1137 (1977); H. T. Edwards, *Arbitration At The Crossroads: The "Common Law of the Shop" v. External Law*, 32 The Arb. J. 65 (1977); and *Judicial Deference to Arbitral Determinations: Continuing Problems of Power and Finality*, 23 U. C. L. A. Law Rev. 936 (1976).

3. 363 U. S. at 599.

scope of judicial review under external law. Therefore, not surprisingly, the Circuits have announced various and conflicting formulations of the scope of post-arbitral review, all based ostensibly upon a reading of *Enterprise Wheel's* so-called "essence" test.

II.

The Third Circuit's formulation of the *Enterprise Wheel* "essence" test appears in *Ludwig Honold Mfg. Co. v. Fletcher*, 405 F.2d 1123 (3rd Cir. 1960), where Judge Aldisert noted that the courts which have attempted to apply *Enterprise Wheel* have met the problem of formulating a consistent and workable standard to be utilized in exercising the function of review. He observed:

> Circuit and District Court decisions have not exuded uniformity in translating the "essence" test into a pronouncement of the appropriate extent or limitation of judicial review of the arbitrator's interpretation. 405 F. 2d at 1126.

The following is a sampling of views of the Circuits which have interpreted *Enterprise Wheel's* essence test:

—Where *the* "fact" underlying an arbitrator's decision is a *non-fact*, or there was a "gross mistake", the award cannot stand.[4]

—An arbitrator's award may be vacated if the arbitrator had no ground upon which to base his interpretation.[5]

4. *Electronics Corp. v. International U. of E., R. & M. W., L.* 272, 492 F. 2d 1255, 1257 (1st Cir. 1974).

5. *H. K. Porter Co., Inc. v. United Saw, File and Steel Products Workers of America, etc.*, 333 F. 2d 596, 602 (3rd Cir. 1964).

—The Court should interfere where the arbitrator clearly went beyond the scope of the submission,[6] or where the authority to make an award cannot be found or legitimately assumed from the terms of the arbitration agreement,[7] or if the arbitrator made a determination not required for the resolution of the dispute.[8]

—The reviewing court should not disturb the award so long as the interpretation was not arbitrary,[9] or even though the award permits the inference that the arbitrator may have exceeded his authority,[10] or merely because it believes that sound legal principles were not applied.[11]

—There should be no review whatsoever of an arbitrator's interpretation of the agreement.[12]

—Where the award is not derived from the agreement in a rational way, viewed in light of its language,

6. *Textile Workers Union of America, etc. v. American Thread Co.*, 291 F. 2d 894, 897-898 (4th Cir. 1961).

7. *Truck Drivers and Helpers Union Local 784 v. Ulry-Talbert Co.*, 330 F. 2d 562, 563 (8th Cir. 1964).

8. *Socony Vacuum Tanker Men's Ass'n v. Socony Mobil Oil Co.*, 369 F. 2d 480, 482 (2nd Cir. 1966).

9. *Local 7-644 Oil, Chemical & Atomic Workers International Union v. Mobil Oil Co.*, 350 F. 2d 708, 712 (7th Cir. 1965).

10. *Brotherhood of Railroad Trainmen v. St. Louis Southwestern Ry. Co.*, 220 F. Supp. 319, 325 (E. D. Tex. 1963).

11. *Dallas Typographical Union, No. 173 v. A. H. Belo Corp.*, 372 F. 2d 577, 581 (5th Cir. 1967).

12. *International Brotherhood of Pulp, Sulphite and Paper Mill Workers Local Union No. 874 v. St. Regis Paper Co.*, 362 F. 2d 711, 714 (5th Cir. 1966); *Western Iowa Pork Co. v. National Brotherhood Packinghouse and Dairy Workers*, 366 F. 2d 275, 277 (8th Cir. 1966); *American Machine & Foundry Co. v. United Auto, Aerospace and Agr. Implement Workers*, 256 F. Supp. 161, 162 (S. D. N. Y. 1963); aff'd, 329 F. 2d 147 (2nd Cir. 1964).

its context, and any other indicia of the parties' intention, the reviewing court may vacate the award.[13]

—The award must not be a capricious, unreasonable interpretation of the contract.[14]

—It must be possible for an honest intellect to interpret the words of the contract and reach the result the arbitrator reached.[15]

III.

The Third Circuit's formulation of the *Enterprise Wheel* "essence" test in *Honold* is as follows:

> Accordingly, we hold that a labor arbitrator's award does "draw its essence from the collective bargaining agreement" if the interpretation can in any rational way be derived from the agreement, viewed in the light of its language, its context, and any other indicia of the parties' intention; only where there is a manifest disregard of the agreement, totally unsupported by principles of contract construction and the law of the shop, may a reviewing court disturb the award.
>
> 405 F. 2d at 1128.

Obviously, in the above formulation of the Third Circuit—as in *Enterprise Wheel*—there is an unresolved tension between the primacy of the labor agreement versus the primacy of external law.

13. *Ludwig Honold Mfg. Co. v. Fletcher*, 405 F. 2d 1123 (3rd Cir. 1969).

14. *Holly Sugar Corp. v. Distillery Rectifying, Wine & A. W. I. U. Workers*, 412 F. 2d 899, 904 (9th Cir. 1969).

15. *San Francisco-Oakland Newspaper Guild v. Tribune Pub. Co.*, 407 F. 2d 1327, 1328 (9th Cir. 1969).

In the Third Circuit itself this tension has resulted in conflicting decisions. In *Bieski v. Eastern Auto Forwarding Co.*, 396 F. 2d 32, 38 (3d Cir. 1968), the Third Circuit rejected "gross mistake" as a reason for judicial review, thereby overruling *H. K. Porter Co., Inc. v. United Saw, etc. Workers of America,* 333 F. 2d 596 (3d Cir. 1964). In *Honold* the Third Circuit appears to have reinstated *Bieski* by holding that review is permitted when the arbitrator's interpretation is "totally unsupported by principles of contract construction", i.e., by external law.

IV.

The instant case would, we submit, have been decided by the courts below in favor of Falstaff, had they had a mandate from this Court under which they would have been constrained to examine and study the record. Had the courts below done so, they would have found that:

—The Arbitrator's conclusion that there was an unlawful contracting-out by Falstaff of the bargaining unit work was a *non-fact,* not supported at all in the record. The two independent beer distributors—who sought to fill the economic vacuum which resulted from Falstaff's shut-down of its North Bergen Depot and who bought beer at *wholesale* from Falstaff's Cranston, Rhode Island plant—never had, even in the aggregate, more than 3,000 customers. There never has been any explanation as to how Falstaff could have "converted" to distribution of beer to its former 17,000 customers as a result of the independents' activities.

—The finding that "agreements were made by the company to have two distributors market and deliver their products within the areas designated to be served by employees represented by the Union" was a *non-fact.*

—The finding that Falstaff never protested the arbitrability of the contract termination issue was a *non-fact.* When the Union wrote to the arbitrator in an attempt to enlarge the narrow scope of the grievance, Falstaff wrote in reply: "the company strenuously objects to the union's demand for arbitration regarding * * * reopening the Depot which is completely shut down at this time after the contract with the Union was terminated * * * This arbitration [sic] does not nor *could not have jurisdiction over these issues*".

—The Union asserts (Brief, p. 11, note 3) that Falstaff sent a written notice of its desire to terminate the parties' labor agreement effective May 31, *1977* (at the end of the automatically renewed term erroneously found by the arbitrator), but the record is barren of any such document. However, Falstaff accepts the Union's concession that the labor contract was terminable by a single written notice of one party's desire to terminate the agreement, a notice which was given by the Union to Falstaff and which forestalled any possibility of automatic renewal of the contract.

—The revelant provision of the labor agreement requires that to effect a termination a party need give only *one* notice to the other party that "changes are desired herein *and* that the desired changes will be submitted * * *".

V.

The parties to a collective bargaining agreement should, we submit, have a reasonable expectation that an arbitrator's determinations under a labor agreement will be at some point reviewed, in some fashion, in accordance with external law, by a federal judge, particularly with respect to issues as to which the arbitrator clearly has no special competence, and issues such as jurisdiction,

arbitrability, due process and like which historically fall within the province of a court. If that is not a completely justifiable expectation, this Court should emphatically now so announce.

Neither of the two key issues in the instant case falls within any area of any special arbitral expertise. The contracting-out issue and the contract termination issue simply involve principles of external contract law. The determination of questions of contract law which are devoid of any special labor law considerations, is uniquely the province of a court rather than of an arbitrator.[16] Nor was there in this case any history of collective bargaining between Falstaff and the Union to be relied upon by the arbitrator. Whatever the arbitrator's "greater institutional competency", *NLRB v. Acme Industrial Co.*, 385 U. S. 432, 436, 87 S. Ct. 565 (1967), or whatever his "new expertise", *NLRB v. Strong*, 393 U. S. 357, 365, 89 S. Ct. 541 (1969), the two key issues herein were uniquely within the province of the court. No questions involving the application of the "common law of the shop" were involved. The arbitrator determined the two key issues in favor of the Union (contrary, we submit, to external law), and ordered Falstaff to pay the Union more than $1.8 million. In easy reliance on the arbitral award, the District Court affirmed. In easy reliance upon the District Court's disposition of the case, the Court of Appeals affirmed the District Court.

VI.

The contract termination issue was a jurisdictional issue,[17] and should have been given plenary review under

16. *Cf. Pullman, Inc. v. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers*, 354 F. Supp. 496, 499 (E. D. Pa. 1972).

17. *International Brotherhood of Teamsters, etc., Local 249 v. Western Pennsylvania Motor Carriers Association*, 574 F. 2d 783 (3rd Cir. 1978).

external law. Certainly, if there had been no automatic renewal of the labor contract for an additional 12 month period, then, obviously, the arbitrator would have had no basis for any award relating to that additional year period. The delineation of the proper relationship between the labor contract and external law is even more imperative as to such issues which affect the arbitrator's very jurisdiction and power and authority to act.

Based, we submit, on a misreading of *Enterprise Wheel*, the courts below refused to give even the jurisdictional issue some kind of plenary review. Had there not been the constraint of its misinterpretation of *Enterprise Wheel*, the District Court, in the first instance, would have decided the contract termination issue, we submit, in favor of Falstaff. It was plainly intimated by the District Court that it felt that the arbitrator's ruling on the contract termination clause was contrary to principles of external law:

> My subjective opinion as to the proper construction or application of the clause is of no moment here. * * * Whether such an interpretation is the best interpretation is not a matter for this Court *Enterprise Wheel and Car Corp., supra,* at 599. (Petition, A29-A30)

The District Court's very citation of *Enterprise Wheel* emphasizes the pressing necessity for this Court to announce a clear delineation of the scope of judicial review of arbitral awards.

VII.

It has been pointed out that giving a finality to arbitral awards is repugnant to the provision in labor contracts prohibiting the arbitrator from "adding to, subtracting

from or modifying" any of its terms. The labor contract in the instant case contains such a clause (Article XI), and provides that "the arbitrator shall have no power to *add to or subtract from or modify* any of the terms of this Agreement or any agreement made supplemental thereto." Even the most conscientious exponent of the arbitrator as a "contract reader" will concede that when a labor agreement contains such a no-modification provision, arbitral finality is foreclosed, and the court has broad power of review. *Torrington v. Metal Workers Local 1645*, 362 F. 2d 667 (2d Cir. 1966).

VIII.

Twenty years after *Enterprise Wheel*, the relationship between labor arbitration and the courts remains obscure. The instant case offers this Court an opportunity to fix the parameters of judicial review over arbitral determinations, an important area in which the Circuits are hopelessly divided.

In defining the scope of review, this Court should give finality to those issues which fall within an arbitrator's special expertise, but leave open for possible judicial correction clear violations by the arbitrator of external law and procedural issues which affect fairness and due process. In the instant case, for example, the arbitrator ignored the fact that the grievance related only to contracting-out, and not to any shut-down of the Depot, and that counsel for the Union even noted of record that the Union filed its grievance after Falstaff sales at wholesale to the two independents, and not because of Falstaff's shut-down of the Depot.

CONCLUSION.

For the above reasons, and the reasons stated in Falstaff's petition, a writ of certiorari should issue to review the Judgment Order of the Third Circuit entered on October 22, 1979.

Respectfully submitted,

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